Supreme Court, U. S.
FILED
APR 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., AND
NORTHERN FREIGHT LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:

GROVE, JASKIEWICZ, GILLIAM
AND COBERT
1730 M Street, N.W.
Washington, D.C.

LEONARD A. JASKIEWICZ
WILLIAM H. SHAWN
1730 M Street, N.W.
Suite 501
Washington, D.C.

Counsel for Petitioners

April 10, 1978

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
I. THIS APPEAL INVOLVES SIGNIFICANT STATUTORY AND POLICY CONSIDERATIONS IN THE ADMINISTRATION OF THE INTERSTATE COMMERCE ACT AND THE HOBBS ACTS BECAUSE THE DECISION BELOW WOULD BAR APPEALS FROM INTERSTATE COMMERCE COMMISSION DECISIONS ON RECONSIDERATION, EXERCISED IN THE COMMISSION'S DISCRETION, AFTER PROCEEDINGS HAVE BECOME ADMINISTRATIVELY FINAL	5
A. The Decision Below Violates the Established Ability of Administrative Agencies to Reconsider Their Actions, Without Judicial Interference, and the Right of Agency Litigants to Appeal Those Decisions	5
B. The Decision Below Would Prematurely Involve the Courts in Agency Actions	7
CONCLUSION	8
Appendix A (Orders of the Interstate Commerce Commission and the United States Court of Appeals)	1a
Appendix B (Statutes Involved)	63a

TABLE OF AUTHORITIES

Cases:	Page
American Farm Lines v. *Black Ball Freight*, 397 U.S. 532 (1970)	5
B. J. McAdams v. *Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir. 1977)	6-7
Montship Lines, Limited v. *Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961)	6
Provisioners Frozen Food Exp., Inc. v. *Interstate Commerce Commission*, 536 F.2d 1303 (9th Cir. 1976)	7
Tallman v. *Udall*, 324 F.2d 411 (D.C. Cir. 1963), *rev'd on other grds.*, 380 U.S. 1 (1965)	6
Statutes:	
Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*	
5 U.S.C. § 702	5
Judiciary Code, 28 U.S.C. §§ 1, *et seq.*	
28 U.S.C. § 1250 (a)	2
28 U.S.C. § 1254 (1)	2
28 U.S.C. § 2341	6
28 U.S.C. § 2344	2
Interstate Commerce Act, 24 Stat. 379 (1887), 49 Stat. 543 (1935), 54 Stat. 929 (1940), 56 Stat. 284 (1942), 72 Stat. 568 (1958)	
Section 17(5), 49 U.S.C. § 17(5)	2, 3
Section 17(6), 49 U.S.C. § 17(6)	2, 5
Section 17(9), 49 U.S.C. § 17(9)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ———

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., AND
NORTHERN FREIGHT LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Akers Motor Lines, Inc., of Delaware, Akers Motor Lines, of North Carolina, Central Motor Lines, Inc., and Northern Freight Lines, Inc. (the *Petitioners*), petition for a Writ of Certiorari to review the *per curiam* order of the United States Court of Appeals for the Fourth Circuit entered in this case on January 10, 1978.

OPINIONS BELOW

The *per curiam* order of the Court of Appeals appears in the Appendix A to this Petition. The Initial Decision and subsequent orders of the Interstate Commerce Commission also appear in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1978 (Appendix A), and this Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1250(a).

QUESTION PRESENTED

Whether the United States of Court of Appeals for the Fourth Circuit can refuse to review Interstate Commerce Commission orders decided on the merits after a proceeding has become administratively final.

STATUTES INVOLVED

Section 2344 of the Judicial Code, and Sections 17(5), (6), and (9) of the Interstate Commerce Act, 49 U.S.C. §§ 17(5), (6), and (9) are presented in Appendix B.

STATEMENT

The Petitioners are motor common carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Akers filed an application before the Commission for control of Central and Northern through the purchase of stock. After an oral hearing at which numerous competing carriers appeared and objected to any acquisition of control, the Commission, through an Administrative Law Judge, approved the application on May 12, 1976, in an Initial

Decision, and subjected the transaction to a stipulation entered between the parties. That stipulation generally provided authority which was transferred to another motor common carrier, Transcon Lines, Inc., in a related, consolidated proceeding from Central and Northern, would be restricted against the transportation of general commodities generally within points east of the Mississippi.

No parties filed exceptions to the Initial Decision and, under operation of law in 49 U.S.C. § 17(5), the Initial Decision became the Commission's order. The Initial Decision did not order cancelled any authority Central and Northern intended to retain. Upon review of the substantial appendix to the Initial Decision, which appears in Appendix A to this Petition, Petitioners' employees noticed numerous certificates were missing from the abstract of certificates of public convenience and necessity presented in the Initial Decision within that section of the certificates Petitioners would be permitted to retain.

On August 15, 1976, Petitioners thus filed a letter-petition to the Commission in which they noted the Initial Decision had omitted their certificates. After the Commission accepted the letter-petition for filing and treated it as a petition for modification, it formally denied the request for relief on November 11, 1976. Petitioners duly submitted a Petition for Reconsideration of the November 11, 1976, order. In an order dated April 28, 1977, the Commission, acting in its appellate capacity, denied the Petition for Reconsideration and affirmed its earlier decision denying the letter-petition. On June 16, 1977, the Commission denied Petitioners' last administrative appeal, which sought a finding of general transportation importance.

On June 23, 1977, Petitioners initiated an appellate action before the United States Court of Appeals for the Fourth Circuit by submitting a Petition for Review. Peti-

tioners' competing motor carriers subsequently, successfully, sought permission to intervene as Respondents.

Before the filing of briefs, several Intervening Respondents submitted Motions to Dismiss the appeal. They variously argued the Initial Decision had become administratively final upon its adoption by the Commission and no timely Petition for Judicial Review had been taken from that Initial Decision. They also argued the Commission's action below was unreviewable agency discretion. Petitioners and Respondent Commission opposed the motions. After the Court entertained briefs on the merits, it granted a Motion to Dismiss, in a *per curiam* order dated December 5, 1977. The Court found the letter-petition had been filed after the 60-day period following the Initial Decision's adoption by the Commission had expired. It thus concluded the letter-petition was untimely and did not affect the running of the 60-day time period for filing a Petition for Judicial Review and it concluded any subsequently filed petitions, which had been accepted by and deliberated upon by the Commission before their denial, did not create new final orders which gave the Court jurisdiction to review the Initial Decision adopted by the Commission. The Court also concluded the Commission had not abused its jurisdiction in denying the letter-petition.

Petitioners filed a Petition for Rehearing on December 19, 1977, and the Court denied that request on January 10, 1978. The Court below also denied Petitioners' Request for a Stay of Mandate pending application to this Court for a Writ of Certiorari, the proceeding below became final.

I. THIS APPEAL INVOLVES SIGNIFICANT STATUTORY AND POLICY CONSIDERATIONS IN THE ADMINISTRATION OF THE INTERESTATE COMMERCE ACT AND THE HOBBS ACTS BECAUSE THE DECISION BELOW WOULD BAR APPEALS FROM INTERSTATE COMMERCE COMMISSION DECISIONS ON RECONSIDERATION, EXERCISED IN THE COMMISSION'S DISCRETION, AFTER PROCEEDINGS HAVE BECOME ADMINISTRATIVELY FINAL.

A. The Decision Below Violates the Established Ability of Administrative Agencies to Reconsider Their Actions, Without Judicial Interference, and the Right of Agency, Litigants to Appeal Those Decisions.

The Court of Appeals' decision effectively bars from review substantive agency action entered after a proceeding has become administratively final. It thus circumvents powers delegated by Congress to the Commission, and other similarly-situated agencies, and attendent rights of appeal by delineating a class of substantive administrative action which is unreviewable.[1] The Court of Appeals' holding is inconsistent with other circuits and it promises to carve out a class of unreviewable substantive agency action unique to the Fourth Circuit.

Section 17(6) of the Interstate Commerce Act allows parties to seek reconsideration of Commission orders, ". . . at any time . . . ," subject, as here, to the Commission's discretion in accepting a post-finality petition for filing and disposition. 49 U.S.C. § 17(6). In interpreting the Act, Mr. Justice Douglas, in *American Farm Lines* v. *Black Ball Freight*, 397 U.S. 532 (1970) found, ". . .[i]t indeed empowers the Commission at any time to grant

[1] The created class of unreviewable agency action offends the Administrative Procedure Act, which provides, ". . . [a] person suffering legal wrong because of agency action, or adversely, affected by agency action within the meaning of the relevant statute, is entitled to judicial review thereof. . . ." 5 U.S.C. § 702.

rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. . . ." *Id.*, at 540 (footnote omitted). In defining when a proceeding actually becomes final, and thus ripe for appeal, Mr. Justice Douglas also observed, ". . . [u]nless Congress provides otherwise, "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied . . ." *Id.*, at 541 (citation omitted). Congress did not provide otherwise in the Act.

The courts have considered the impact of post-finality agency treatment of petitions for reconsideration or review upon jurisdictional appeal periods. In *Tallman* v. *Udall*, 324 F.2d 411 (D.C. Cir. 1963), *rev'd on other grds*, 380 U.S. 1 (1965), the District of Columbia Circuit held the time for filing a petition for review does not begin to run until after a petition for rehearing has been decided.[2] Notably, that holding contemplated a petition filed, as here, after the time for submitting petitions had expired. Court jurisdiction is, therefore, measured from the time a court acts upon a post-finality petition. *Montship Lines, Limited* v. *Federal Maritime Board*, 295 F.2d 147, 151 (D.C. Cir. 1961).

The *Tallman* and *Montship* holdings apply to the case at bar because each considered a statutorily-defined period for appeals similar to the 60-day limitation applied to final Commission orders since the Hobbs Act Amendment became law on March 1, 1975. 28 U.S.C. §§ 2341, *et seq.* The United States Court of Appeals for the Eighth Circuit has recently held the time for appealing a Commission decision does not commence running until after the carrier has received notice of an order denying its petition for general transportation importance. *See, B. J. Mc-*

[2] The success of the petition before the agency is not material. It need not, as the Court of Appeals below intimated, be granted. The action upon the post-finality petition is the reviewable agency conduct.

Adams v. *Interstate Commerce Commission*, 551 F.2d 1112, 1114, and 1115 (1977).

The Court of Appeals' decision below would precipitate court intervention in agency actions by necessitating the abuse envisioned by the Court in *B. J. McAdams*. It would require agency litigants to file pro forma petitions for judicial review while post-finality petitions are pending before the Commission. The Courts and the Commission would thus be confronted by simultaneous jurisdiction with an unnecessary duplication of efforts.

B. The Decision Below Would Prematurely Involve the Courts in Matters Committed to Agency Discretion.

The court in *B. J. McAdams* referenced judicial economy and the possibility that post-finality agency action could render judicial review unnecessary. Where, as in the proceeding at bar, the Commission has accepted post-finality petitions for filing and has acted on the merits of those petitions, the interests of judicial economy require a court to allow the agency an opportunity to change its mind before the courts consume potentially duplicative efforts in reviewing the entire record with which the agency has become intimately familiar.[3]

The decision below, with its mistaken reliance upon the rejection holding in *Provisioners*, would prematurely involve the courts in pending agency actions. It would require protective filings in the courts of apeals even where the Commission may be entertaining a petition which, if

[3] Where the Commission or any other agency exhibits its intent to refuse any post-finality review by rejecting a petition, appeal is ripe. Under those different circumstances, no duplication of agency and court effort could occur. *See, for example, Provisioners Frozen Exp., Inc.* v. *Interstate Commerce Commission*, 536 F.2d 1303, 1305 (9th Cir. 1976). The Commission in this proceeding treated the merits of Petitioners' post-finality petitions and entertained replies by protesting carriers to one such action. Notably, the Commission opposed the motion to dismiss later granted by the Court of Appeals.

granted, could obviate the need for an appeal. The agency would thus be required to litigate orders it too might find erroneous if it were afforded an opportunity to act.

The Court of Appeals decision below will require all diligent Commission litigants to, at a minimum, file protective appeals when the Commission has nonetheless accepted post-finality petitions. At a maximum, it will simply obviate the Commission's opportunity to accept and deliberate upon such petitions, even where the Commission might have been disposed to change its action. The courts, agencies, and litigants can only suffer from the Court of Appeals' decision.

Petitioners believe determination of this issue is of significant importance to administrative agencies, the courts, and private litigants. This Court should therefore review this issue to properly define the period from which the jurisdictional time for court review begins in an administrative proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

Of Counsel:

GROVE, JASKIEWICZ, GILLIAM
AND COBERT
1730 M Street, N.W.
Washington, D.C.

April 10, 1978

LEONARD A. JASKIEWICZ
WILLIAM H. SHAWN
1730 M Street, N.W.
Suite 501
Washington, D.C.

Counsel for Petitioners

Appendices

TABLE OF CONTENTS

Page

INITIAL DECISION of Administrative Law Judge Joseph R. Nacy in Akers Motor Lines, Inc.—Control —Central Motor Lines, Inc., Et Al. 1a

NOTICE, of the Interstate Commerce Commission to the Parties in Akers Motor Lines, Inc.—Control— Central Motor Lines, Inc., Et Al. 42a

NOTICE, of the Interstate Commerce Commission to the Parties in Akers Motor Lines, Inc.—Control— Central Motor Lines, Inc., Et Al. 43a

ORDER, of the Interstate Commerce Commission denying Petition for Modification 44a

ORDER, of the Interstate Commerce Commission denying Petition for Reconsideration 48a

ORDER, of the Interstate Commerce Commission denying Petition Requesting a Finding of General Transportation Importance 51a

ORDER, of the United States Court of Appeals for the Fourth Circuit denying Intervenor's Transcon Lines, Inc., Motion to Dismiss the Appeal 53a

ORDER, per curiam of the United States Court of Appeals for the Fourth Circuit, granting Intervenors' Motions to Dismiss 54a

ORDER, of the United States Court of Appeals for the Fourth Circuit, denying Petitioners' Petition for Rehearing 61a

ORDER, of the United States Court of Appeals for the Fourth Circuit, denying Petitioners' Petition for a Stay of Mandate Pending Application to the United States Supreme Court for a Writ Certiorari 62a

APPENDIX A

INTERSTATE COMMERCE COMMISSION

[Service Date, May 12, 1976]

INITIAL DECISION

No. MC-F-12321 [1]

AKERS MOTOR LINES, INC.—
CONTROL—CENTRAL MOTOR LINES, INC.

INITIAL DECISION

PRESENT: Joseph R. Nacy, Administrative Law Judge, to whom the matters which are the subjects of this Initial Decision have been referred for action.

In No. MC-F-12321, It appearing, That, by joint application filed October 1, 1974, Akers Motor Lines, Inc., a Delaware corporation (Akers-Del.), of Charlotte, N.C., and Central Motor Lines, Inc., also of Charlotte, seek approval, under Sec. 5, Interstate Commerce Act, 49 U.S.C. Sec. 5, of acquisition by the former of control of the latter, and for acquisition of control of Central by Victor DeMaras, also of Charlotte, as a part of the transaction. The operating rights of Central sought to be controlled are conveyed in certificates of public convenience and necessity issued in Docket No. MC-39406 and subnumbers thereunder. Pending determination of this proceeding, Akers-Del. operates the rights and properties of Central under temporary authority issued by this Commission under Sec. 210a(b) of the Act, 49 U.S.C. Sec.

---

[1] Embraces Nos. FD-27900, Akers Motor Lines, Inc.—Securities; and MC-F-12557, Transcon Lines—Purchase (Portion)—Central Motor Lines, Inc., et al.

310a(b). The aggregate gross revenues of Akers-Del. and Central exceeded $300,000 for a period of 12 consecutive months ending not more than 6 months preceding the date of the agreement of these parties covering this proposed transaction;

It further appearing, That Akers-Del. and Akers Motor Lines, Inc., a North Carolina corporation (Akers-N.C.), a motor carrier holding certificates of public convenience and necessity issued by this Commission in Nos. MC-72442 and sub-numbers thereunder, are commonly controlled by applicant DeMaras through ownership of capital stock;

It further appearing, That Akers-Del. is not a carrier, but is hereinafter to be authorized to acquire control of a carrier and its operating rights, as contemplated in Sec. 5(3) of the Act, 49 U.S.C. Sec. 5(3);

It further appearing, That the lawfulness of the proposal in No. MC-F-12321 has been demonstrated by applicants' detailed evidence, in that the operating rights sought to be controlled through the purchase of all of Central's capital stock by Akers-Del., pursuant to agreement after arm's-length bargaining for the price of $7.5 million, have been actively operated through the years by Central; that Central's balance sheet, as of December 27, 1975, showed cash on hand of $198,284; that, as of December 27, 1975, Akers-Del. had cash on hand of only $604, but held an irrevocable letter of credit from the First National Bank of Boston establishing a line of credit at $7.5 million; that this amount, plus the monthly earnings Akers-Del. may reasonably be expected the realize from operation of Central, will permit payment of the agreed purchase price without resort to further borrowing; that the personal net worth of DeMaras, as of December 16, 1975, was $4,225,775, of which $12,000 was cash on hand;

In No. MC-F-12557, It appearing, That, by joint application filed June 12, 1975, and amended before and at the hearing, Transcon Lines, of El Segundo, Calif., seeks authority, under Sec. 5 of the Act, to purchase a portion of the operating rights of Central Motor Lines, Inc., and Northern Freight Lines, Inc., both of Charlotte. The operating rights sought to be purchased are stated in Appendix A hereto attached; those to be retained by Central and Northern, in Appendix B hereto attached. Pending determination of this proceeding, Transcon operates the rights sought to be purchased under temporary authority issued by this Commission under Sec. 210a(b) of the Act. The aggregate gross revenues of the parties to this proceeding exceeded $300,000 for a period of 12 consecutive months ending not more than 6 months preceding the date of the agreement of these parties covering this proposed transaction;

It further appearing, That the lawfulness of the proposal in No. MC-F-12557 has been demonstrated by applicants' detailed evidence, in that the operating rights sought to be purchased pursuant to agreement after arm's-length bargaining for the adjusted price of $2,400,000, have actively been operated through the years by Central and Northern; that Transcon's balance sheet, as of December 31, 1975, showed cash on hand of $2,223,368; that this amount, plus Transcon's monthly earnings, will permit payment of the agreed purchase price without resort to borrowing;

In No. FD-27900, It appearing, That, by application filed May 5, 1975, Akers-Del. seeks authority, under Secs. 20a and 214 of the Act, 49 U.S.C. Secs. 20a and 314, to issue an evidence of indebtedness, if such is found to be a security within the meaning of the Act, coupled with a motion to dismiss said application upon the ground that said evidence of indebtedness is not such a security, and

that this Commission's approval is not required prior to the issuance of said evidence of indebtedness;

It further appearing, That Rule No. 70(a) of this Commission's General Rules of Practice, 49 CFR 1100.70(a), denies an Administrative Law Judge the authority to decide a motion to dismiss, wherefore said motion has, in the preparation of this Initial Decision, been treated as a request for summary judgment based upon the grounds therein alleged;

It further appearing, That the evidence of indebtedness proposed to be issued by Akers-Del. is of the type and form found by this Commission not to be a security within the meaning of the Act in *Bruce Motor Freight, Inc.—Control and Merger*, 87 M.C.C. 436 (1961), and that the effect of the contrary decision of this Commission in *Expanded Definition of Term "Securities"*, 344 I.C.C. 114 (1973), has been stayed;

In all proceedings, it appearing, That all of these proceedings were referred to the undersigned Administrative Law Judge for hearing and initial decision; that public hearing was held in all proceedings, on a consolidated record, on February 9-12, 1976, at Washington, D. C.; that all applicants appeared through witnesses and presented evidence and testimony as to the lawfulness of their applications; that the Commission's Bureau of Enforcement appeared contesting the consistency of the transactions in Nos. MC-F-12321 and FD-27900 with the public interest, upon the ground of the alleged lack of fitness of Akers-Del., but did not offer either testimony or evidence tending to prove its allegations; that certain local Teamster unions appeared and offered testimony and evidence urging the imposition of conditions for the protection of carrier employees; that no party presented evidence or testimony in opposition to a grant of any of these applications; and that the public interest will best

be served by disposition of all these proceedings without the issuance of a detailed Initial Decision;

In all proceedings; it further appearing, That the interests of carrier employees will be adequately and completely protected and served by the imposition, as a condition precedent to the approval and authorization of all these proceedings, of conditions for the protection of said employees similar to those imposed in *Interstate Mot. Frt. Syst., Inc.—Pur.—Great Lakes*, 122 M.C.C. 232, 236-238 (1975);

And, in all proceedings, it further appearing, That, on the basis of the evidence verifying the above facts, none of the authority sought to be controlled or purchased is dormant; that the purchase agreements were negotiated at arm's length and in good faith; that the purchase prices, as finally adjusted and described above, are reasonable; that Akers-Del. is financially able to purchase the capital stock of Central; that Transcon is financially able to purchase the operating rights of Central and Northern as above described; that approval of the transactions will result in operating economies for Akers-Del., Transcon, Central, and Northern, and will not restrain competition; that the terms and conditions of the transactions, as set forth in the applications and in the agreements of record and the amendments thereto of record, would be just and reasonable; that no fixed charges inconsistent with the public interest would be incurred by either Akers-Del. or Transcon as a result of the transactions; that any potential adverse effect upon carrier employees will be eliminated by the protective conditions hereinafter imposed as conditions precedent to approval of these transactions; that both transactions in Nos. MC-F-12321 and MC-F-12557 are within the scope of Sec. 5(2)(a) of the Act, and will be consistent with the public interest; and that a grant of the approval herein sought will not amount to a major federal action significantly affecting the quality

of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4331, *et seq.*;

It is, therefore, ordered that:

1. In No. MC-F-12321, the acquisition by Akers-Del. of control of Central through ownership of capital stock, and the acquisition by Victor DeMaras of control of the operating rights of Central through that transaction be, and they are hereby, approved and authorized subject to the terms hereof;

2. In No. MC-F-12321, concurrently with the transaction approved and authorized herein, and pursuant to Sec. 5(3) of the Act, Akers-Del. shall be considered a motor carrier subject to the provisions of Secs. 204(a)(1) and (2), 214, and 220 of the Act, 49 U.S.C. Secs. 304(a)(1) and (2), 314, and 320, to the extent of filing such reports as may hereafter be required;

3. In No. MC-F-12557, purchase by Transcon of the described operating rights of Central and Northern be, and it is hereby, approved and authorized subject to the terms hereof;

4. In No. FD-27900, the application be, and it is hereby, denied;

5. In Nos. MC-F-12321 and MC-F-12557, any employee of Central, Northern, Akers-Del., or Transcon separated from his position, as a result of the consummation of either or both of said proceedings, on or after October 16, 1974 (the date temporary authority was issued unto Akers-Del. to operate the rights and properties of Central), shall receive, for a period of not more than 6 weeks, severance pay at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, said payments to be reduced by the amount of the total wages earned during the period in

which he otherwise was employed during the 6 weeks, including any unemployment benefit payments, such payments to be as follows:

a) To employees separated on or after October 16, 1974, and before April 7, 1976 (the date temporary authority was issued unto Transcon to operate the rights of Central and Northern herein sought to be purchased), payment shall be made by Akers-Del.;

b) To employees separated on or after April 7, 1976, payment shall be made by Transcon;

and in the event of any dispute or controversy arising with respect to the protection afforded by this order, which cannot be settled by the said parties, employees, or authorized representatives of either, within 30 days after the controversy arises, it may be referred by said party, employees, or representatives to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedures, expenses, and similar matters are to be agreed upon by the parties, the employees, or the authorized representatives of either;

6. In Nos. MC-F-12321 and MC-F-12557, if the parties to the transactions herein approved and authorized desire to consummate the same, they shall (a) promptly take such steps as will insure full compliance with the requirements of Secs. 215, 217, and 221(c) of the Act 49 U.S.C. Secs. 315, 317, and 321(c), and with the Commission's requirements, rules, and regulations thereunder; (b) confirm in writing to the Commission, immediately after consummation, the date on which such consummation actually took place; and (c) submit for consideration sworn statements (and one copy each thereof), hereby required within 60 days after actual consummation of the transaction, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized and exercised, including the consideration, legal and other fees,

commissions, and any and all other costs incidental to the transaction, the assets acquired, and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

7. In No. MC-F-12557, upon full compliance by Transcon Lines with the requirements of Secs. 215, 217, and 221(c) of the Act, and the Commission's requirements, rules, and regulations thereunder, a certificate of public convenience and necessity authorizing the operations herein acquired by said carrier be issued unto Transcon Lines, and that, if such compliance is not effected within 90 days after the date of service of a notice to the parties that this order has become effective as the order of the Commission, or within such additional times as the Commission may authorize, the grant of authority herein made shall be considered as null and void, and the application in No. MC-F-12557 shall stand denied in its entirety effective upon the expiration of said compliance time;

8. The authorities herein granted shall not be exercised prior to the date of service of an order adopting this order as the order of the Commission, or of a notice stating that this order has become effective as the order of the Commission;

9. Unless the authorities herein granted are exercised within 90 days from the date of service of such order or notice this order shall be of no further force and effect;

10. Recital herein of balance sheet or other financial data shall not be construed as approval of accounting methods which have been followed, or of expenditures represented thereby; and

11. Unless stayed by the Commission on its own motion, or by the timely filing of exceptions under the Commission's General Rules of Practice, this order shall become effective as the order of the Commission, Division Three, 30 days from the date of service hereof.

Dated at Washington, D. C., this 3rd day of May, 1976.

By the Commission, Joseph R. Nacy, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX A

No. MC-F-12557

Operating Rights Sought To Be Purchased
And Approved For Purchase

(Identical)

In Certificate No. MC-39406

(A)

REGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment.

GENERAL RESTRICTION: In connection with all regular route operations in Section (A) carrier shall only transport shipments (1) between points south of the Virginia-North Carolina State line, on the one hand, and, on the other, points north of said State line, subject to the specific restrictions hereinafter imposed on service at points on the routes applicable, and (2) between points in North Carolina, on the one hand, and, on the other, points south of the North Carolina-South Carolina State line, not subject to the specific restrictions hereinafter imposed on service at points on the routes applicable.

Between junction U. S. Highway 52 and North Carolina State Road 1669 near Stanleyville, N. C., and junction North Carolina Highway 66 and U. S. Highway 421, near Kernerville, N. C., serving no intermediate points and serving junction U. S. Highway 52 and North Carolina State Road 1669 for the purpose of joinder only:

From junction U. S. Highway 52 and North Carolina State Road 1669 over North Carolina State Road 1669 to junction North Carolina Highway 66, thence over North Carolina Highway 66 to junction U. S. Highway 421, and return over the same route.

Between New York, N. Y., and North Augusta, S. C., serving the intermediate points of Jersey City, Newark, and Trenton, N. J., points in New Jersey between Newark and the Mercer-Middlesex County line; Philadelphia, Pa., points in the Philadelphia, Pa., Commercial Zone, as defined by the Commission; Baltimore, Md., Raleigh, Cary, Sanford, and Albemarle, N. C., points between Raleigh and Cary, N. C., points between Albemarle, N. C., and North Augusta, S. C., and the off-route points of Bound Brook, Dunellen, Clifton, and Lodi, N. J., Bristol, Pa., points in the New York, N. Y., and Philadelphia, Pa., Commercial Zones, as defined by the Commission; Oakboro, Stanfield, and Midland, N. C., points in Aiken and Barnwell Counties, S. C., also, and in connection with this route, serving the off-route points of Whitmire and Newberry, S. C., and those in Spartanburg, Greenville, Pickens, Anderson, Abbeville, Greenwood, and Laurens Counties, S. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State Line, and from points north of said State line to points in these counties:

SPECIFIC RESTRICTION: Service at the intermediate and off-route points named, following the route description immediately below, is subject to the specific restrictions applicable:

From New York via Holland Tunnel to Jersey City, N. J., thence over Business and Truck U. S. Highway 1 to junction U. S. Highway 1,

at Newark, N. J., thence over U. S. Highway 1 to Philadelphia, Pa., thence over U. S. Highway 13 to State Road, Del., thence over U. S. Highway 40 to Baltimore, Md., thence over U. S. Highway 1 to Raleigh, N. C., thence over unnumbered highway (formerly portion U. S. Highway 1) via Cary, N. C., to junction U. S. Highway 1 near Apex, N. C., thence over U. S. Highway 1 to Junction U. S. Highway 15-501 near Sanford N. C., thence over U. S. Highway 15-501 to Carthage, N. C., thence over North Carolina Highway 27 to Charlotte, N. C., thence over U. S. Highway 21 to Rock Hill, S. C., thence over South Carolina Highway 72 to Chester, S. C., thence over U. S. Highway 321 to West Columbia, S. C., thence over U. S. Highway 1 to junction South Carolina Highway 421, thence over South Carolina Highway 421 via Clearwater, S. C., to junction South Carolina Highway 125, thence over South Carolina Highway 125 to North Augusta, and return over the same route.

Service at the intermediate points of Trenton, N. J., and those in New Jersey between Newark and the Mercer-Middlesex County line; and the off-route points of Bound Brook, Dunellen, Clifton, and Lodi, N. J., is restricted to the pickup of southbound shipments of general commodities, with the above-specified exceptions, and to the delivery of northbound shipments of textiles, textile products, and knit goods.

Service at the off-route point of Bristol, Pa., is restricted to the pickup of southbound shipments of zinc dust destined to Greensboro, N. C.

Between Henderson, N. C., and Durham, N. C., serving no intermediate points, and serving Henderson for the purpose of joinder only:

From Henderson over Alternate U. S. Highway 158 to Oxford, N. C., thence over U. S. Highway 15 to Durham, and return over the same route.

Between junction U. S. Highway 1 and U. S. Highway 130, near Milltown, N. J., and Easley, S. C., serving the intermediate points of Paulsboro and Carneys Point, N. J., points in Philadelphia, Pa., Commercial Zone, as defined by the Commission; Baltimore, Md., Reidsville, N. C., points between Reidsville, N. C., and Easley, S. C., and the off-route points of Milltown, Hightstown, Beverly, and Riverside, N. J., points in the Philadelphia, Pa., Commercial Zone as defined by the Commission; and New Castle, Del.; also, and in connection with this route, serving the off-route points of Whitmire and Newberry, S. C., and those in Spartanburg, Greenville, Pickens, Anderson, Abbeville, Greenwood, and Laurens Counties, S. C., and those in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

SPECIFIC RESTRICTION: Service at the intermediate and off-route points named, following the route description immediately below, is subject to the specific restrictions applicable.

From junction U. S. Highway 1 and U. S. Highway 130 over U. S. Highway 130 to junction New Jersey Highway 44 (formerly portion U. S. Highway 130), near thorofare, N. J.), thence over New Jersey Highway 44 to junction U. S. Highway 130, near Bridgeport, N. J., thence over U. S. Highway 130 to junction U. S. Highway 40, thence over U. S. Highway 40 to Bal-

timore, Md., thence over U. S. Highway 1 to Washington, D. C., thence over U. S. Highway 29 to junction U. S. Highway 29A (formerly portion U. S. Highway 29) at or near Greensboro, N. C., thence over U. S. Highway 29A to junction U. S. Highway 29 at or near High Point, N. C., thence over U. S. Highway 29 to Greenville, S. C., thence over U. S. Highway 123 to Easley, and return over the same route.

Service at the intermediate point of Paulsboro, N. J., is restricted to the pickup of southbound shipments of general commodities, with the above-specified exceptions.

Service at the intermediate point of Carneys Point, N. J., and the off-route point of New Castle, Del., is restricted to the pickup of southbound shipments of chemicals and dyes.

Service at the off-route point of Milltown, N. J., is restricted to the pickup of southbound shipments of general commodities, with the above-specified exceptions, and to the delivery of northbound shipments of textiles, textile products, and knit goods.

Service at the off-route points of Hightstown, Beverly, and Riverside, N. J., is restricted to the delivery of northbound shipments of textiles, textile products, and knit goods.

Between Richmond, Va., and Danville, Va., serving no intermediate points and serving each terminal only for the purpose of joinder:

From Richmond over U. S. Highway 360 to junction Virginia Highway 304, thence over Virginia Highway 304 to junction U. S. Highway 58, and thence over U. S. Highway 58 to Danville, and return over the same route.

Between Raleigh, N. C. and Greensboro, N. C., serving all intermediate points, and the off-route points of Elon College, Gibsonville, and McLeansville, N. C.:

From Raleigh over U. S. Highway 70 (portion formerly Alternate U. S. Highway 70), to junction U. S. Highway Business 70 east of Hillsborough, N. C., thence over U. S. Highway Business 70 to junction U. S. Highway 70 west of Hillsborough, N. C., thence over U. S. Highway 70 (portion formerly Alternate U. S. Highway 70) to Greensboro, and return over the same route.

Between Hanes, N. C., and Siler City, N. C., serving all intermediate points:

From Hanes over U. S. Highway 158 to Winston-Salem, N. C., thence over U. S. Highway 421 to Siler City, N. C., and return over the same route.

Between Greensboro, N. C., and Siler City, N. C., serving all intermediate points, and the off-route points of Cedar Falls, Central Falls, Franklinville, and Worthville, N. C.:

From Greensboro over U. S. Highway 220 to Asheboro, N. C., thence over U. S. Highway 64 to Siler City, and return over the same route.

Between junction U. S. Highways 29 and 29A, near China Grove, N. C., and Charlotte, N. C., serving all intermediate points:

From junction U. S. Highways 29 and 29A, near China Grove, over U. S. Highway 29A to Concord, N. C., thence over North Carolina State Road 1157 (formerly portion U. S. Highway 29A) to junction North Carolina Highway 49 (formerly portion U. S. Highway 29A), about

three miles southeast of Concord, N. C., thence over North Carolina Highway 49 to junction North Carolina State Road 2939 (formerly portion U. S. Highway 29A), about two miles north of Newell, N. C., thence over North Carolina State Road 2939 to Charlotte, and return over the same route.

Between Shelby, N. C., and Kings Mountain, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State Line, and from points north of said State line to points in these counties:

From Shelby over Alternate U. S. Highway 74 to junction U. S. Highway 74, thence over U. S. Highway 74 to Kings Mountain, and return over the same route.

Between Charlotte, N. C., and Monroe, N. C., serving all intermediate points:

From Charlotte over U. S. Highway 74 to junction unnumbered highway southeast of Charlotte, thence over unnumbered highway to Monroe, and return over the same route.

Between Maiden, N. C., and junction U. S. Highway 74 and North Carolina Highway 15, near Shelby, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties

to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Maiden over U. S. Highway 321 to Lincolnton, N. C., thence over North Carolina Highway 150 to junction U. S. Highway 74, and return over the same route.

Between Charlotte, N. C., and Lincolnton, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State Line, and from points north of said State line to points in these counties:

From Charlotte over North Carolina Highway 27 to Lincolnton, and return over the same route.

Between Charlotte, N. C., and Clover, S. C., serving all intermediate points:

From Charlotte over North Carolina Highway 49 to the North Carolina-South Carolina State line, thence over South Carolina Highway 49 to York, S. C., thence over U. S. Highway 321 to Clover, and return over the same route.

Between Charlotte, N. C., and Statesville, N. C., serving all intermediate points:

From Charlotte over U. S. Highway 21 to junction North Carolina Highway 115 (formerly U. S. Highway 21) about three miles north of Charlotte, thence over North Carolina Highway 115 to Statesville, and return over the same route.

Between Pineville, N. C., and Lancaster, S. C., serving all intermediate points:

From Pineville over U. S. Highway 521 to Lancaster, and return over the same route.

Between Monroe, N. C., and Chester, S. C., serving all intermediate points, and the off-route points of Waxhaw and Mineral Springs, N. C., and Great Falls, S. C.:

From Monroe over North Carolina Highway 200 to the North Carolina-South Carolina State Line, thence over South Carolina Highway 200 to Lancaster, thence over South Carolina Highway 9 to Chester, and return over the same route.

Between Cleveland, S. C., and Simpsonville, S. C., serving all intermediate points; also, and in connection with this route, serving the off-route points of Whitmire, and Newberry, S. C., and those in Spartanburg, Greenville, Pickens, Anderson, Abbeville, Greenwood, and Laurens Counties, S. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State Line, and from points north of said State line to points in these counties:

From Cleveland over U. S. Highway 276 to Simpsonville, and return over the same route.

Between Blacksburg, S. C., and Gaffney, S. C., serving all intermediate points:

From Blacksburg over South Carolina Highway 5 to junction South Carolina Highway 18, thence over South Carolina Highway 18 to Gaffney, and return over the same route.

Between Clearwater, S. C., and Augusta, Ga., serving all intermediate points:

SPECIFIC RESTRICTION: Service at Augusta is subject to the specific restriction applicable, following the route description immediately below:

From Clearwater over South Carolina Highway 421 to junction U. S. Highway 1, thence over U. S. Highway 1 to Augusta, and return over the same route.

Service at Augusta is restricted to the delivery of southbound shipments of general commodities, with the above-specified exceptions, moving from points authorized in Section (A) in New York; New Jersey (except Hightstown, Beverly, and Riverside); Pennsylvania (except Bristol); and Delaware; and to the pickup of northbound shipments of textiles, textile products, and knit goods, moving to points authorized in Section (A) in New York; New Jersey (except Paulsboro and Carneys Point); and Pennsylvania (except Bristol).

Between Albemarle, N. C., and Badin, N. C., serving no intermediate points:

From Albemarle over North Carolina Highway 27 to junction North Carolina Highway 740, thence over North Carolina Highway 740 to Badin, and return over the same route.

Between Lincolnton, N. C., and Gastonia, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Lincolnton over U. S. Highway 321 to Gastonia, and return over the same route.

Between Maiden, N. C., and Hickory, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Maiden over U. S. Highway 321 to Hickory, and return over the same route.

Between Hickory, N. C., and Asheville, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Hickory over Alternate U. S. Highway 70 to junction U. S. Highway 70, thence over U. S. Highway 70 to Asheville, and return over the same route.

Between Asheville, N. C., and Tuxedo, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N.C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and

from points north of said State line to points in these counties:

From Asheville over U. S. Highway 25 to Tuxedo, and return over the same route.

Between Hendersonville, N. C., and Tryon, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Hendersonville over U. S. Highway 176 to Tryon, and return over the same route.

Between Hendersonville, N. C., and Bat Cave, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Hendersonville over U. S. Highway 64 to Bat Cave, and return over the same route.

Between Bat Cave, N. C., and Shelby, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments

from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Bat Cave over U. S. Highway 74 to Shelby, and return over the same route.

Between Forest City, N. C., and Henrietta, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Forest City over Alternate U. S. Highway 221 to Henrietta, and return over the same route.

Between Shelby, N. C., and Lawndale, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties:

From Shelby over North Carolina Highway 18 to Fallston, N. C., and thence over North Carolina Highway 182 to Lawndale, and return over the same route.

(B)

REGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Lancaster, S. C., and Charleston, S. C., serving no intermediate points:

From Lancaster over U. S. Highway 521 to Heath Springs, S. C., thence over unnumbered highway to junction U. S. Highway 521, located at or near De Kalb, S. C., thence over U. S. Highway 521 to junction South Carolina Highway 261, located at or near Boykin, S. C., thence over South Carolina Highway 261 to junction South Carolina State Road S-43-51 (about two miles northwest of Pinewood, S. C.), thence over South Carolina State Road S-43-51 to Rimini, S. C., thence over South Carolina State Road S-14-26 to Summerton, S. C., thence over U. S. Highway 15 to Santee, S. C., thence over South Carolina Highway 6 to junction South Carolina Highway 310, located at or near Vance, S. C., thence over South Carolina Highway 310 to junction U. S. Highway 176, located about one mile northwest of Holly Hill, S. C., thence over U. S. Highway 176 to junction U. S. Highway 52, located about one mile northwest of Goose Creek, S. C., thence over U. S. Highway 52 to Charleston, and return over the same route.

Between Rock Hill, S. C., and Columbia, S. C., serving no intermediate points:

From Rock Hill over U. S. Highway 21 to Columbia, and return over the same route.

Between Pageland, S. C., and Darlington, S. C., serving no intermediate points, and serving Darlington for purposes of joinder only:

From Pageland over South Carolina Highway 151 to junction South Carolina Highway 34, located about six miles west of Darlington, thence over South Carolina Highway 34 to Darlington, and return over the same route.

Between Chester, S. C., and North Augusta, S. C., serving no intermediate points:

From Chester over South Carolina Highway 121 to Belvedere, S. C., thence over South Carolina Highway 126 to Clearwater, S. C., thence over South Carolina Highway 421 to junction South Carolina Highway 125, located about two miles east of North Augusta, thence over South Carolina Highway 125 to North Augusta, and return over the same route.

Between Wallace, S. C., and Florence, S. C., serving no intermediate points:

From Wallace over U. S. Highway 1 to Cheraw, S. C., thence over U. S. Highway 52 to Florence, and return over the same route.

RESTRICTION: The authority granted in Section (B) shall not be severable, by sale or otherwise, from the irregular route authority contained in Section (C).

(C)

IRREGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment.

Between points in South Carolina.

RESTRICTION: Carrier shall not, pursuant to the irregular-route authority contained in Section (C), transport shipments moving between any points authorized in Section (B) to be served by it in regular route operations.

In Certificate No. MC-39406 (Sub-No. 10)

ALTERNATE ROUTES FOR OPERATING CONVENIENCE ONLY:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Conover, N. C., and Salisbury, N. C., in connection with otherwise authorized regular route operations between Asheville and Greensboro, N. C. and Hickory and Greensboro, N. C., serving no intermediate points:

From Conover over U. S. Highway and Alternate or By-Pass U. S. Highway 70 to Salisbury, and return over the same route.

Between Asheboro, N. C. and Wallace, S. C., in connection with otherwise authorized regular route operations between Greensboro, N. C., and Florence, S. C., serving no intermediate points:

From Asheboro over U. S. Highway 220 to Rockingham, N. C., and thence over U. S. Highway 1 to Wallace, and return over the same route.

Between Monroe, N. C., and Pageland, S. C., in connection with otherwise authorized regular route operations between Charlotte, N. C., and Florence, S. C., serving no intermediate points:

From Monroe over U. S. Highway 601 to Pageland, and return over the same route.

In Certificate No. MC-39406 (Sub-No. 14)

REGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Serving the plant site of Vick Manufacturing Division of Richardson Merrell, Inc., in the borough at Hatboro, Montgomery County, Pa., as an off-route point in connection with carrier's two presently authorized regular-route operations (1) between New York, N. Y., and North Augusta, S. C., and (2) between junction U. S. Highways 1 and 130, near Milltown, N. J., and Easley, S. C.

In Certificate No. MC-39406 (Sub-No. 15)

REGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment,

Serving the Central Distribution Center of Hanes Corp., Knitwear Division, in Davie County, N. C. (approximately 12 miles southwest of Winston-Salem, N. C.), as an off-route point in connection with carrier's authorized regular-route operations.

In Certificate No. MC-3167

REGULAR ROUTES:

General commodities, except commodities in bulk, in tank vehicles,

Between Atlanta, Ga., and Tournapul, Ga.:

From Atlanta over U. S. Highway 23 to junction U. S. Highway 123, thence over U. S. Highway 123 via Toccoa, Ga., to Tournapul, and return over the same route.

Service is authorized to and from the intermediate points of Toccoa, Ga., and those between Toccoa and Atlanta; and off-route points within 15 miles of Atlanta. Service at such off-route points is subject to the following commodity description:

General commodities, except those of unusual value, classes A and B explosives, livestock, household goods, as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between points in Georgia, as follows, serving all intermediate points:

From Gainesville over U. S. Highway 129 via Quillians and Clermont, to Cleveland, and return over the same route.

From Cornelia over U. S. Highway 23 to Lumite, and return over the same route.

From Toccoa over Georgia Highway 17 to Lavonia, thence over Georgia Highway 59 to Carnesville, and return over the same route.

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Toccoa, Ga., and Greenville, S. C., serving no intermediate points:

From Toccoa over U. S. Highway 123 to Greenville, and return over the same route.

IRREGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Greenville, S. C., on the one hand, and, on the other, points in Georgia lying on and east of U. S. 221, within 100 miles of Greenville.

In Certificate No. MC-31675 (Sub-No. 2)

General commodities, except those of unusual value, dangerous explosives, livestock, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, and commodities requiring special equipment, over regular routes,

Between Gainesville, Ga., and Commerce, Ga.:

From Gainesville over U. S. Highway 129 via Talmo, Ga., to Jefferson, Ga., and thence over Georgia Highway 15 to Commerce, and return over the same route.

Service is authorized to and from all intermediate points, except Jefferson, Ga.

Between Commerce, Ga., and junction Georgia Highway 52 and U. S. Highway 23:

From Commerce over Georgia Highway 98 to Maysville, Ga., and thence over Georgia Highway 52 via Gillsville, Ga., to junction U. S. Highway 23, and return over the same route.

Service is authorized to and from all intermediate points, and the off-route point of Homer, Ga.

In Certificate No. MC-31675 (Sub-No. 14)

REGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Dahlonega, Ga., and Gainesville, Ga., serving all intermediate points:

From Dahlonega over Georgia Highway 249 to junction Georgia Highway 115, thence over Georgia Highway 115 to junction Georgia Highway 136, thence over Georgia Highway 136 to Gainesville, and return over the same route.

In Certificate No. MC-31675 (Sub-No. 15)

REGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Cornelia, Ga., and Dahlonega, Ga., serving all intermediate points between Dahlonega and Clarkesville, Ga. (not including Clarkesville), and the off-route point of Helen, Ga.:

From Cornelia over U. S. Highway 23 and 441 to Clarkesville, Ga., then over Georgia Highway

115 via Cleveland, Ga., to junction Georgia Highway 52, thence over Georgia Highway 52 to Dahlonega, and return over the same route.

In Certificate No. MC-31675 (Sub-No. 19)

REGULAR ROUTE:

General commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment),

Serving the terminal site of Central Motor Lines, Incorporated, located at or near junction South Carolina Highway 14 and Interstate Highway 85 in Greenville County, S. C., as an off-route point in connection with carrier's otherwise authorized regular route operations.

RESTRICTION: The operations authorized herein are restricted to the transportation of traffic received from or delivered to connecting carriers at the said off-route point.

The authority granted herein shall not be severable by sale or otherwise from carrier's other authority or from the authority held by carrier's affiliate Central Motor Lines, Inc., in Certificate No. MC-39406 and subnumbers.

RESTRICTION: The operations authorized in any of the above described operating rights are restricted to the transportation of traffic originating at or destined to points west of the Mississippi River and points west of the eastern boundary of the State of Minnesota (except points in the St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, as defined by the Commission, and except points in the Davenport, Iowa-Moline and Rock Island, Ill., Commercial Zone, as defined by the Commission).

APPENDIX B

No. MC-F-12557

Operating Rights To Be Retained By Central and Northern

In Certificate No. MC-39406

(A)

REGULAR ROUTES:

General commodities, except those of unusual value, Classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

GENERAL RESTRICTION: In connection with all regular route operations in Section (A) carrier shall only transport shipments (1) between points south of the Virginia-North Carolina State line, on the one hand, and, on the other, points north of said State line, subject to the specific restriction hereinafter imposed on service at points on the routes applicable, and (2) between points in North Carolina, on the one hand, and, on the other, points south of the North Carolina-South Carolina State line, not subject to the specific restrictions hereinafter imposed on service at points on the routes applicable.

Between Chicago, Ill., and Lexington, N. C., serving the intermediate points of Winston-Salem and Erlanger, N. C., the intermediate and off-route points in the Chicago, Ill., Commercial Zone, as defined by the Commission, and the off-route point of Chicago Heights, Ill.:

From Chicago over U. S. Highway 41 to junction U. S. Highway 30, thence over U. S. Highway 30 to Delphos, Ohio, thence over U. S. High-

way 30S to Kenton, Ohio, thence over Ohio Highway 31 to Marysville, Ohio, thence over U. S. Highway 33 to Columbus, Ohio, thence over U. S. Highway 23 to Portsmouth, Ohio, thence over U. S. Highway 52 to Huntington, W. Va., thence over U. S. Highway 60 to Charleston, W. Va.; thence over U. S. Highway 119 to Racine, W. Va., thence over West Virginia Highway 3 to Beckley, W. Va., thence over U. S. Highway 19-21 to Princeton, W. Va., thence over U. S. Highway 460 to Pearisburg, Va., thence over Virginia Highway 100 to junction U. S. Highway 221, thence over U. S. Highway 221 to Hillsville, Va., thence over U. S. Highway 52 to Lexington, and return over the same route.

Between Chillicothe, Ohio, and Lewis, W. Va., serving no intermediate points, and serving each termini for the purpose of joinder only:

From Chillicothe over U. S. Highway 35 to Point Pleasant, W. Va., thence over West Virginia Highway 17 to Lewis, and return over the same route.

Between junction U. S. Highways 41 and 6, near Highland, Ind., and junction U. S. Highways 30 and 33 near Fort Wayne, Ind., serving no intermediate points, and serving each termini for the purpose of joinder only:

From junction U. S. Highways 41 and 6 over U. S. Highway 6 to junction U. S. Highway 33 near Ligonier, Ind., thence over U. S. Highway 33 to junction U. S. Highway 30, and return over the same route.

Between junction U. S. Highways 41 and 30, near Schererville, Ind., and Portsmouth, Ohio, serving no

intermediate points, and serving each termini for the purpose of joinder only:

From junction U. S. Highways 41 and 30 over U. S. Highway 41 to Kentland, Ind., thence over U. S. Highway 52 to Portsmouth, and return over the same route.

Between Mount Airy, N. C., and Salisbury, N. C., serving no intermediate points, and serving Mount Airy for the purpose of joinder only:

From Mount Airy over U. S. Highway 601 to Salisbury, and return over the same route.

Between Durham, N. C., and Cary, N. C., serving all intermediate points:

From Durham over North Carolina State Road S1959 (formerly portion of U. S. Highway 70A) to junction North Carolina Highway 54 (formerly portion of U. S. Highway 70A) at or near Nelson, N. C., thence over North Carolina Highway 54 to Cary, and return over the same route.

Between Siler City, N. C. and Sanford, N. C., serving all intermediate points:

From Siler City, over U. S. Highway 421 to Sanford, N. C., and return over the same route.

Between junction U. S. Highway 70 (formerly shown as alternate U. S. Highway 70) and North Carolina Highway 54, near Burlington, N. C., and Nelson, N. C., serving all intermediate points:

From junction U. S. Highway 70 and North Carolina Highway 54 over North Carolina Highway 54 to Nelson, and return over the same route.

Between Saxapahaw, N. C., and Altamahaw, N. C., serving all intermediate points, and the off-route point of Swepsonville, N. C.:

From Saxapahaw over unnumbered highway to junction North Carolina Highway 87, thence over North Carolina Highway 87 to Altamahaw, and return over the same route.

Between Monroe, N. C., and Marshville, N. C., serving no intermediate points:

From Monroe over U. S. Highway 74 to Marshville, and return over the same route.

Between Sanford, N. C., and Erwin, N. C., serving no intermediate points:

From Sanford over U. S. Highway 421 to Erwin, and return over the same route.

Between Hickory, N. C., and Lenoir, N. C., serving all intermediate points; also, and in connection with this route, serving the off-route points in Gaston, Lincoln, Catawba, Caldwell, Burke, McDowell, Buncombe, Henderson, Polk, Rutherford, and Cleveland Counties, N. C., restricted to the transportation of shipments from points in these counties to points north of the Virginia-North Carolina State line, and from points north of said State line to points in these counties;

From Hickory over U. S. Highway 321 to Lenoir, and return over the same route.

(B)

REGULAR ROUTES:

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Greensboro, N. C., and Cleveland, Ohio, serving no intermediate points:

From Greensboro over Interstate Highway 40 to Winston-Salem, N. C., thence over U. S. Highway 52 to Hillsville, Va., thence over U. S. Highway 221 to junction Virigina Highway 100, located about one mile northeast of Hillsville, thence over Virginia Highway 100 to Pearisburg, Va., thence over U. S. Highway 460 to junction Interstate Highway 77, located about three miles east of Princeton, W. Va., thence over Interstate Highway 77 to junction U. S. Highway 119, located at or near Kanawha City, W. Va., thence over U. S. Highway 119 to Charleston, W. Va., thence over U. S. Highway 21 to junction Interstate Highway 77, located about two miles south of Sissonville, W. Va., thence over Interstate Highway 77 to junction U. S. Highway 21, located about one mile north of Fairplain, W. Va., thence over U. S. Highway 21 to Parkersburg, W. Va., thence over U. S. Highway 50 to Belpre, Ohio, thence over Ohio Highway 7 to Marietta, Ohio, thence over U. S. Highway 21 to junction Interstate Highway 77, located about four miles southeast of Cambridge, Ohio, thence over Interstate Highway 77 to junction U. S. Highway 21, located about seven miles northeast of Cambridge, Ohio, thence over U. S. Highway 21 to Cleveland, and return over the same route.

Between Charleston, W. Va., and Columbus, Ohio, serving no intermediate points, and serving Charleston for purpose of joinder only:

From Charleston over U. S. Highway 60 to junction West Virginia Highway 17, located about one mile west of St. Albans, W. Va., thence over West Virginia Highway 17 to Henderson, W. Va., thence over West Virginia Highway 2 to

Point Pleasant, W. Va., thence over U. S. Highway 35 to Chillicothe, Ohio, thence over U. S. Highway 23 to Columbus, and return over the same route.

RESTRICTION: The authority granted next above is restricted to the transportation of traffic moving from, to, or through Greensboro, N. C.

Between Parkersburg, W. Va., and East Palestine, Ohio, serving no intermediate points, and serving Parkersburg for purposes of joinder only:

From Parkersburg over West Virginia Highway 2 to junction West Virginia Highway 66, located about two miles north of New Cumberland, W. Va., thence over West Virginia Highway 66 to Chester, W. Va., thence over U. S. Highway 30 to junction Ohio Highway 7, located about six miles northwest of East Liverpool, Ohio, thence over Highway 7 to East Fairfield, Ohio, thence over Ohio Highway 558 to East Palestine, and return over the same route.

RESTRICTION: The authority granted next above is restricted to the transportation of traffic moving from, to, or through Greensboro, N. C.

Between Unionville (Washington County), Ohio, and Toledo, Ohio, serving no intermediate points, and serving Unionville for purposes of joinder only:

From Unionville over Ohio Highway 60 to Zanesville, Ohio, thence over U. S. Highway 40 to junction Ohio Highway 37, located about one mile south of Luray (Licking County), Ohio, thence over Ohio Highway 37 to junction Ohio Highway 161, located about one mile south of Granville Ohio, thence over Ohio Highway 161 to Worthington, Ohio, thence over U. S. Highway

23 to junction Ohio Highway 199, located about one mile northwest of Fostoria, Ohio, Highway 199 to junction U. S. Highway 20, located about three miles southeast of Lemoyne, Ohio, thence over U. S. Highway 20 to junction Ohio Highway 120, at or near Lemoyne, Ohio, thence over Ohio Highway 120 to junction Interstate Highway 280, located about two miles north of Lemoyne, Ohio, thence over Interstate Highway 280 to Toledo, and return over the same route.

RESTRICTION: The authority granted next above is restricted to the transportation of traffic moving from, to, or through Greensboro, N. C.

RESTRICTION: The authority granted in Section (B) shall not be severable, by sale or otherwise from the irregular route authority contained in Section (C).

(C)

IRREGULAR ROUTES:

General commodities, except those of unusual value, Classes A and B explosives, livestock, household goods, as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between points authorized to be served on the regular routes in North Carolina as described in Section (A), on the one hand, and, on the other, (a) points in Ohio (other than Akron, Columbus, Zanesville, Dayton, and Reading, those in Hamilton County, and those on U. S. Highway 50 between Belpre and Cincinnati, inclusive), moving through Parkersburg, W. Va., and (b) Akron, Columbus, and Zanesville, Ohio.

Between points in South Carolina, on the one hand, and, on the other, (a) Akron, Columbus, and Zanes-

ville, Ohio, moving through Concord, N. C., and (b) points in Ohio (other than Akron, Columbus, Zanesville, Dayton, and Reading, those in Hamilton County, and those on U. S. Highway 50 between Belpre and Cincinnati, inclusive), moving through Concord, N. C., and Parkersburg, W. Va.

RESTRICTION: Carrier shall not, pursuant to the irregular-route authority contained in Section (C), transport shipments moving between any points authorized in Section (B) to be served by it in regular route operations.

In Certificate No. MC-39406 (Sub-No. 8)

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, over a regular route,

Between Reidsville, N. C., and Danville, Va., and all intermediate points.

From Reidsville over U. S. Highway 29 to Danville, and return over the same route.

NOTE: The authority granted herein may be combined or tacked with that granted in MC-39406 Sub 7, only for the purpose of performing through service between the points herein granted and points in the Chicago, Ill., Commercial Zone as defined by the Commission, or points beyond, notwithstanding the restriction in MC-39406 Sub 7 against operations between points both of which are north of the Virginia-North Carolina State line.

In Certificate No. MC-39406 (Sub-No. 11)

IRREGULAR ROUTES:

General commodities, except those of unusual value, Classes A and B explosives, household goods as de-

fined by the Commission, commodities in bulk, and those requiring special equipment,

Between points in Passaic, Bergen, Morris, Union, Hudson, Essen, Middlesex, Somerset, and Monmouth Counties, N. J.

Between points in Passaic, Bergen, Morris, Union, Hudson, Essex, Middlesex, Somerset, and Monmouth Counties, N. J., on the one hand, and, on the other, points in Richmond, Bronx, New York, Kings, Queens, and Nassau Counties, N. Y.

In Certificate No. MC-39406 (Sub-No. 13)

ALTERNATE ROUTES FOR OPERATING CONVENIENCE ONLY:

General commodities, except those of unusual value, Classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Asheville, N. C., and Indianapolis, Ind., in connection with carrier's authorized regular-route operations, serving no intermediate points and serving Indianapolis, Ind., for the purpose of joinder only:

From Asheville over U. S. Highway 25 to junction U. S. Highway 25E, thence over U. S. Highway 25E to Corbin, Ky., thence over U. S. Highway 25 to Mt. Vernon, Ky., thence over Highway 150 to Louisville, Ky., and thence over U. S. Highway 31 to Indianapolis, and return over the same route.

Between Asheville, N. C., and Cincinnati, Ohio, in connection with carrier's authorized regular-route operations serving no intermediate points and serving Cincinnati, Ohio, for the purpose of joinder only:

From Asheville over U. S. Highway 25 to junction U. S. Highway 25E, thence over U. S. Highway 25E to Corbin, Ky., thence over U. S. Highway 25 to Mt. Vernon, Ky., and thence over U. S. Highway 25 to Cincinnati, and return over the same route.

In Certificate No. MC-39406 (Sub-No. 16)

REGULAR ROUTES:

General commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Winston-Salem, N. C., and Roaring Gap, N. C., serving all intermediate points:

From Winston-Salem over North Carolina Highway 67 to junction U. S. Highway 21 (also from Winston-Salem over U. S. Highway 421 to junction U. S. Highway 21), thence over U. S. Highway 21 to Roaring Gap, and return over the same routes.

Between junction U. S. Highways 421 and 601 at or near Yadkinville, N. C., and Boonville, N. C., serving all intermediate points:

From junction U. S. Highways 421 and 601 over U. S. Highway 601 to Boonville, and return over the same route.

In Certificate No. MC-31675

IRREGULAR ROUTES:

General commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, com-

modities requiring special equipment, and those injurious or contaminating to other lading,

Between Greenville, S. C., on the one hand, and on the other, points in Georgia lying west of U. S. Highway 221, within 100 miles of Greenville (except Toccoa, Ga., and points in the Toccoa, Ga., Commercial Zone, as defined by the Commission).

INTERSTATE COMMERCE COMMISSION

Washington, D. C.

[Service Date, Jun. 21, 1976]

No. MC-F-12321

AKERS MOTOR LINES, INC.—CONTROL—
CENTRAL MOTOR LINES, INC.

Docket No. FD 27900

AKERS MOTOR LINES, INC.—SECURITIES

No. MC-F-12557

TRANSCON LINES—PURCHASE (PORTION)—
CENTRAL MOTOR LINES, INC., ET AL.

June 11, 1976

Initial decision by Administrative Law Judge Joseph R. Nacy, served May 12, 1976.

NOTICE TO THE PARTIES:

On the date indicated above a initial decision accompanied by an order setting forth the reasons therefore was served on the parties to the above-entitled proceeding.

No exceptions to the initial decision and order were filed within the period provided for such filing, and the Commission did not stay the said order, and it became the order of the Commission upon the expiration of the exception period.

ROBERT L. OSWALD,
Secretary.

INTERSTATE COMMERCE COMMISSION

Washington, D. C.

[Service Date, Jul. 20, 1976]

No. MC-F-12321

AKERS MOTOR LINES, INC.—CONTROL—
CENTRAL MOTOR LINES, INC.

No. MC-F-12557

TRANSCON LINES—PURCHASE (PORTION)—
CENTRAL MOTOR LINES, INC., ET AL.

Finance Docket No. 27900

AKERS MOTOR LINES, INC.—SECURITIES

June 11, 1976

Initial decision by Administrative Law Judge Joseph R. Nacy, served May 12, 1976.

NOTICE TO THE PARTIES:

On the date indicated above a initial decision accompanied by an order setting forth the reasons therefore was served on the parties to the above-entitled proceeding.

No exceptions to the initial decision and order were filed within the period provided for such filing, and the Commission did not stay the said order, and it became the order of the Commission upon the expiration of the exception period.

ROBERT L. OSWALD,
Secretary.

ORDER

[Service Date, Nov. 11, 1976]

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, at its office in Washington, D. C., on the 20th day of October, 1976.

No. MC-F-12321 [1]

AKERS MOTOR LINES, INC.—CONTROL—
CENTRAL MOTOR LINES, INC.

Upon consideration of the record in the above-entitled proceedings, including the petition, filed on August 15, 1976, as amended and supplemented August 17, 1976, by Central Motor Lines, Inc. and Northern Freight Lines, Inc., for modification of the initial decision, dated May 3, 1976, which as indicated in the notice to the parties, served on June 21, 1976, became the order of the Commission, effective June 11, 1976, which order approved and authorized the transactions proposed in Nos. MC-F-12321 and MC-F-12557, subject to conditions;

It appearing, That the petitioners claim that the said order, as it presently reads, would cause the loss to the petitioners of a substantial portion of their operating rights which were neither intended to be sold by the applicants nor required to be cancelled by the Commission;

It further appearing, That the operating rights, which the petitioners allege would be lost, authorize the transportation of general commodities, with exceptions, over regular and irregular routes, generally between points in North Carolina, South Carolina, and Georgia (herein re-

[1] Embraces Finance Docket No. 27900, *Akers Motor Lines, Inc.—Securities*, and No. MC-F-12557, *Transcon Lines—Purchase (Portion)—Central Motor Lines, Inc., et al.*

ferred to as the three state authority), restricted to the transportation of shipments from, to or through points in the above-described three state area, on the one hand, and, on the other, from, to or through points in Chicago, Ill., and its Commercial Zone, as defined by the Commission, or from, to or through points in Ohio (herein referred to as the Chicago-Ohio restriction);

It further appearing, That the petitioners allege that the modification sought herein will not result in the retention of any duplicating authority because, although Transcon Lines was authorized in No. MC-F-12557 to acquire the three state authority, the said authority, as acquired by Transcon Lines, is restricted to the transportation of traffic originating at or destined to points west of the Mississippi River and points west of the eastern boundary of the State of Minnesota (except points in the St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, as defined by the Commission, and except points in the Davenport, Iowa-Moline and Rock Island, Ill., Commercial Zone, as defined by the Commission), said restriction hereinafter referred to as the western restriction;

It further appearing, That examination of the transcript of, and the exhibits submitted in, the oral hearing revealed no evidence of a proposed retention by the petitioners of the three state authority subject to the Chicago-Ohio restriction; that in preparing his initial decision, the Administrative Law Judge adopted what the applicants, including the petitioners herein, had identified, through exhibits, as the authority to be transferred to Transcon Lines and the authority to be retained by the petitioners; that, from the evidence, the original intent of the applicants in No. MC-F-12557 was clearly to transfer the three state authority on an unrestricted basis, and the western restriction was not proposed until the applicants did so at the hearing to satisfy motor carrier protestants; that therefore the evidence of record with respect to the trans-

action proposed in No. MC-F-12557 indicates that there was no express or implied understanding that the petitioners would retain the three state authority subject to the Chicago-Ohio restriction;

It further appearing, That no explanation is offered by the petitioners as to why no exceptions were filed to correct the alleged error in the initial decision, and as to why the subject petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision;

It further appearing, That if the petition were granted, the petitioners could, through interlining with carriers operating basically in the Western United States at Chicago, Ill., or at points in Ohio, offer a service duplicative of that which Transcon Lines proposes to offer as a result of the transaction; and

It further appearing, That the retention of operating authority, sought in the instant petition, would result in an unconventional division of operating authority where two carriers would provide a limited service within the same territory, tending to create confusion among shippers and wasteful and inefficient use of transportation facilities, compare *Ringle Exp., Inc.,—Purchase—Contract Carriers, Inc.*, 93 M.C.C. 468, 472 (1963); and that carriers should be discouraged from proposing transactions which, through restrictions, break a broad service provided by a single carrier into several limited services conducted by different carries, thus effectuating a pulverization of operating authority contrary to the public interest, *Red Arrow Frt. Lines, Inc.—Purchase—Galveston*, 104 M.C.C. 820, 824 (1968);

It further appearing, That, in view of the unexplained delay in filing the instant petition and of the undesirable results that would be created by approval of the petition, good cause has not been shown for granting the petition;

It further appearing, and the said Division so finds, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission, Division 3, Commissioners Brown, MacFarland, and Clapp.

ROBERT L. OSWALD,
Secretary.

[SEAL]

ORDER

[Service Date, April 28, 1977]

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of March 1977.

No. MC-F-12321

AKERS MOTOR LINES, INC.—CONTROL—
CENTRAL MOTOR LINES, INC.

No. MC-F-12557

TRANSCON LINES—PURCHASE (PORTION)—
CENTRAL MOTOR LINES, INC. ET AL.

Finance Docket No. 27900

AKERS MOTOR LINES, INC.—SECURITIES

Upon consideration of the record in the above-entitled proceeding including the initial decision served May 12, 1976, which became the order of the Commission effective June 21, 1976, when no exceptions to said decision were filed, letter-petition for modification filed August 15, 1976, the denial of said petition by the Commission, Division 3, served August 11, 1976, the petitions filed December 13, 1976, and December 20, 1976, by Central Motor Lines, Inc., and Northern Freight Lines, Inc., seeking reconsideration of said order served November 11, 1976, and the reply, as supplemented, filed January 21, 1977, by Bowman Transportation, Inc., Carolina Freight Carriers Corp., Mercury Motor Express, Inc., Thurston Motor Lines, Inc., and Pilot Freight Carriers, Inc.; and

It appearing, That in No. MC-F-12557, Transcon Lines was granted authority to acquire certain of petitioners' operating rights including authority to operate over regular routes between certain points in Georgia, South Carolina, and North Carolina (three State authority), restricted to the transportation of traffic originating at or destined to points west of the Mississippi River, subject to exceptions which are not pertinent here, and that the authorized transaction was consummated on July 23, 1976;

It further appearing, That petitioners contend that Appendix B to the initial decision, which sets forth the authority to be retained by petitioners, deprives them of substantial rights they believe were to be retained; namely, the three State authority restricted to the transportation of traffic destined to or originating at points in the Chicago, Ill., Commercial Zone or points in Ohio, and that petitioners state they did not become aware of the omission until after the time for filing exceptions had expired;

It further appearing, That in reply, protestants assert that they withdraw their opposition to the proposed transaction based upon the stipulation by the applicants to the restriction imposed on the authority set forth above; that such stipulation did not include the retention by petitioners of the three State authority; and that protestants argue that petitioners must be bound by the stipulation entered into by the parties;

It further appearing, That neither in the application in No. MC-F-12557, nor at the oral hearing, nor in the stipulation, nor at any time prior to the consummation did petitioners indicate any interest in retaining the three state authority for purposes of serving the Chicago, Ill., Commercial Zone and points in Ohio; that because petitioners did not present this proposal prior to

consummation protestants were not given an opportunity to present evidence in opposition; that approving the modification as proposed would deny protestants due process of law; that by exercising the authority granted in No. MC-F-12557, petitioners accepted the conditions stated in the initial decision; and that accordingly, said petition for reconsideration should be denied; and

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

It is ordered, That the petition for reconsideration be, and it is hereby, denied.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, MacFarland and Clapp. Commissioner MacFarland was absent and did not participate in the disposition of this proceeding.

ROBERT L. OSWALD
Secretary.

[SEAL]

ORDER

ATTACHMENT VII—June 16, 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 2nd day of June, 1977.

No. MC-F-12321

AKERS MOTOR LINES—CONTROL—
CENTRAL MOTOR LINES, INC.

No. MC-F-12557

TRANSCON LINES—PURCHASE (PORTION)—
CENTRAL MOTOR LINES, INC. ET AL.

Finance Docket No. 27900

AKERS MOTOR LINES, INC.—SECURITIES

Upon consideration of the record in the above-entitled proceeding, including the petition of Central Motor Lines, Inc. and Northern Freight Lines, Inc. filed May 13, 1977, seeking a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation is involved in this proceeding.

It is ordered, That the said petition be, and it is hereby, denied.

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission. Chairman O'Neal, Vice Chairman Clapp, and Commissioner Christian also voted to reopen the proceeding on the Commission's own motion to consider what, if any, rights were retained by the vendor.

H. G. HOMME, JR.
Acting Secretary

[SEAL]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1837

AKERS MOTOR LINES, INC., CENTRAL MOTOR LINES, INC., and NORTHERN FREIGHT LINES, INC.,
Petitioners,

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

JOHNSON MOTOR LINES, INC., SMITH'S TRANSFER CORP., TRANSCON LINES, INC., BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, McLEAN TRUCKING CO., MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC.,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

Upon consideration of the motion of Transcon Lines, Inc. to dismiss appeal and the responses to the motion, by counsel,

IT IS ORDERED that the motion to dismiss the petition for review is denied.

FOR THE COURT—BY DIRECTION

/s/ William K. Slate, II
Clerk

A True Copy Teste:
By /s/ Faye L. Smith
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1837

AKERS MOTOR LINES, INC., CENTRAL MOTOR LINES, ING., and NORTHERN FREIGHT LINES, INC.,
Petitioners,

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

JOHNSON MOTOR LINES, INC., SMITH'S TRANSFER CORP., TRANSCON LINES, INC., BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, McLEAN TRUCKING CO., MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC.,
Intervenors.

On Petition for Review of an Order of the Interstate Commerce Commission

---

Submitted October 28, 1977 Decided December 5, 1977

Before BOREMAN, Senior Circuit Judge, and WINTER and BUTZNER, Circuit Judges

---

Leonard A. Jaskiewicz and William H. Shawn (Grove, Jaskiewicz, Gilliam and Cobert, of counsel) on brief for Petitioners, Akers Motor Lines, Inc., of Delaware; Akers Motor Lines, Inc., of North Carolina; Central Motor Lines, Inc.; and Northern Freight Lines, Inc.

Mark L. Evans, General Counsel; Henri F. Rush, Associate General Counsel; and Wayne M. Senville, Attorney, for Interstate Commerce Commission; John H. Shenefield, Assistant Attorney General; Robert B. Nicholson and Robert L. Thompson, Attorneys, Department of Justice; on brief for Respondents, Interstate Commerce Commission and the United States of America.

Griffin, Dysart, Taylor, Penner and Lay; Wentworth E. Griffin, Howard D. Lay, Robert W. Cotter (local counsel Gaddin, Major, Schubert & Hyman and Calvin F. Major) on brief for separate intervening respondent, Transcon Lines.

Donald E. Cross, Leo C. Franey, Maurice F. Bishop, and Gerald D. Colvin, Jr. (Rae, Cross & Auchincloss and Bishop, Sweeney & Colvin, of counsel) on brief for intervening respondents, Johnson Motor Lines, Inc., Bowman Transportation, Inc., Carolina Freight Carriers Corporation, Mercury Motor Express, Inc., Thurston Motor Lines, Inc., McLean Trucking Company, and Pilot Freight Motor Carriers, Inc.

PER CURIAM:

This administrative proceeding arose out of an application filed by Akers Motor Lines, Inc., with the ICC for control of Central Motor Lines, Inc., and Northern Freight Lines, Inc. (hereinafter referred to as petitioners), through the purchase of stock. The ICC must approve any transaction which involves the acquisition of a licensed motor carrier by another licensed motor carrier. The application was opposed by Johnson Motor Lines, Inc.,

Bowman Transportation and a number of other motor carriers (hereinafter referred to as intervenors) on the ground that their interests would be adversely affected by Akers' control of Central and Northern. After a hearing the Administrative Law Judge (ALJ) approved petitioners' application on May 12, 1976, subject to the stipulation by the parties that part of Central's operating rights would be sold to Transcon Lines, Inc., another motor carrier. No exceptions were filed to the ALJ's decision and under 49 U.S.C. § 17(5) the absence of exceptions makes the initial decision of the ALJ the order of the Commission. *See* 49 C.F.R. § 1100.96. The Commission gave notice to the parties on June 21, 1976, that the ALJ's decision had become the order of the Commission on June 11, 1976. The parties then had 60 days under 28 U.S.C. § 2344 in which to initiate judicial review.

Rather than filing a petition for judicial review, however, petitioners submitted a letter petition to the Commission on August 15, 1976, complaining that the ALJ's order incorrectly listed the operating rights they were to retain. The Commission accepted the letter petition, treating it as a petition for modification, and formally denied the petition on November 11, 1976. Thereafter petitioners submitted a petition for reconsideration of the order of November 11, 1976. The Commission, acting in its appellate capacity, refused to reconsider its earlier order and denied the second petition on April 28, 1977. In a final tempt to invoke an administrative remedy, petitioners filed a petition seeking a finding that an "issue of general transportation importance" was involved. That petition was denied by the Commission on June 16, 1977. Petitioners now seek review before this court of the orders of June 16, 1977, and April 28, 1977, and of the initial decision of the ALJ of May 12, 1976.

The intervenors have filed motions to dismiss on the grounds that: (1) the ALJ's decision became administratively final upon adoption by the Commission and no timely petition for judicial review was filed; and (2) the Commission's action below represents unreviewable agency discretion. In addition, one group of intervenors has filed a motion for summary affirmance based upon the stipulation entered into by petitioners below which intervenors contend is dispositive of the issues presented for judicial review.

Jurisdiction to review ICC orders must be invoked by a petition for review, and the petition must be filed in timely fashion.[1] 28 U.S.C. § 2344 provides:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

The time limitations for seeking judicial review are *jurisdictional.* Fed.R.App.P. 26(b); *Microwave Comm., Inc.* v. *FCC,* 515 F.2d 385,388-89 (D.C. Cir. 1974).

The intervenors contend that this case became administratively final when the ALJ's decision became the order of the Commission on June 11, 1976, and that the petition for judicial review was untimely because it was filed more than a year thereafter. Petitioners and the Commission claim, however, that the 60-day period was triggered by the Commission's last act in the case which was

---

[1] Prior to 1975, judicial review of ICC decisions was controlled by 28 U.S.C. § 2321, *et seq.*, and there was no time limitation for judicial review of Commission decisions. In 1975 Congress amended the Hobbs Act, 28 U.S.C. § 2341, *et seq.*, to include final orders of the ICC within the Act's 60-day time limitation for judicial review of agency decisions. One of the primary purposes of the amendment was to eliminate existing problems caused by open-ended judicial review of ICC decisions. 1974 U.S. Code, Cong. & Adm. News 7028, 7033.

the denial of the "general transportation importance" petition of June 16, 1977. Because the petition for judicial review was filed within 60 days of the denial of this last petition, petitioners and the Commission assert that the petition for reivew was timely filed.

Petitioners waived their right to file exceptions and were required to attack the resultant Commission order by a petition for reconsideration filed with the Commission as authorized by 49 U.S.C. § 17(6). Section 17(6) provides that a petition may be brought "at any time, subject to such limitations as may be established by the Commission . . . ." The Commission requires that petitions for rehearing, reargument or reconsideration "must be filed within 30 days after the date of service of a decision or order" exception "for good cause shown, and upon leave granted." 49 C.F.R. § 1100.101(e). Petitioner's letter petition requesting a *modification* of the Commission's order of June 21, 1976, was filed on August 15, 1976, and the Commission found in denying the petition:

> That no explanation is offered by petitioners as to why no exceptions were filed to correct the alleged error in the initial decision, and as to why the subject petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision;
>
> . . .
>
> That, in view of the unexplained delay in filing the instant petition and for the undesirable results that would be created by approval of the petition, good cause has not been shown for granting the petition;
>
> . . .
>
> It is ordered, That the petition be, and it is hereby, denied.

Because the letter petition of August 15, 1976, was untimely filed and the Commission did not find good

cause for granting the petition, we conclude that the letter petition did *not* affect the running of the 60-day time period for filing a petition for judicial review. The Commission's denial of the letter petition on November 11, 1976, and its denial of the two subsequently filed petitions do not create new final orders which would give this court jurisdiction to review the ALJ's decision which the Commission adopted. As recognized by the Ninth Circuit in a similar situation, "[t]o hold otherwise would allow for the review of the Commission's action without restriction as to time by merely filing successive petitions to reopen for further hearing." *Provisioners Frozen Exp., Inc.* v. *ICC*, 536 F.2d 1303, 1305 (9 Cir. 1976). Moreover, an interpretation that would allow a petitioner judicial review simply by untimely filing—and being denied—a petition to reopen its case would frustrate the congressional purpose, plainly evidenced in § 2344, to impose a 60-day limitation upon judicial review of the Commission's final order resolving the issues in controversy. *Cf. Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

Nor does it appear that the Commission abused its discretion in denying the letter petition filed August 15, 1976, or in denying the two subsequent petitions. The granting or denying of a petition to reopen the proceedings is within the sound discretion of the Commission and only upon a showing of a clear abuse of that discretion could this court overrule its denial of the petitions. *See Provisioners, supra, and the cases cited therein.* The letter petition was filed outside the time period set by the Commission, 49 C.F.R. § 1100.101(e). In addition, the parties had consummated the transaction in question in reliance upon the failure to file exceptions and the Commission's adoption of the ALJ's initial decision. Because the Commission considered the "unexplained delay" in filing the letter petition and the "undesirable results" that would have been created by reopening the case,

we find no abuse of discretion in denying the untimely filed letter petition or the two subsequent petitions.

Therefore, we conclude that the 60-day statutory period for petitioning this court for review of an administratively final order had elapsed prior to the filing of the petition for judicial review in this case, and the denial of the untimely filed letter petition was well within the discretion of the Commission and did not affect the running of the 60-day time period. Intervenors' motions to dismiss should be granted and

IT IS SO ORDERED.

A True Copy, Teste
William K. Slate, II, Clerk
By /s/ Faye L. Smith
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1837

AKERS MOTOR LINES, INC., CENTRAL MOTOR LINES, ING., and NORTHERN FREIGHT LINES, INC.,
Petitioners,

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

JOHNSON MOTOR LINES, INC., SMITH'S TRANSFER CORP., TRANSCON LINES, INC., BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, MCLEAN TRUCKING CO., MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC.,
Intervenors.

ORDER

Upon consideration of the petitioners' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing be denied.

Entered at the direction of Judge Boreman, for a panel consisting of Judge Boreman, Judge Winter, and Judge Butzner.

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

[Filed Jan. 10, 1970, William K. Slate, II, Clerk]

[Filed Jan. 16, 1978,
U.S. Court of Appeals, Fourth Circuit]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1837

AKERS MOTOR LINES, INC., CENTRAL MOTOR LINES, ING., and NORTHERN FREIGHT LINES, INC.,
Petitioners,

versus

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

JOHNSON MOTOR LINES, INC., SMITH'S TRANSFER CORP., TRANSCON LINES, INC., BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, McLEAN TRUCKING CO., MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC.,
Intervenors.

ORDER

Upon consideration of a motion of the petitioner, for stay of mandate pending application to the United States Supreme Court for a Writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

A True Copy, este:
William K. Slate, II, Clerk

By /s/ Marilyn J. Kolin
Deputy Clerk

APPENDIX B

Statutes Involved

28 U.S.C. § 2344

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

* * * *

49 U.S.C. § 17(5)

Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reason therefor, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under chapter 8 of this title, persons specified in section

305(e) of this title), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

* * * *

49 U.S.C. § 17(6)

After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon the Commission. If the decision, order, or requirement was made by a division, an individual dual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

* * * *

49 U.S.C. § 17(9)

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce,

enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Supreme Court, U. S.
FILED
MAY 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., and
NORTHERN FREIGHT LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit on Behalf of Intervening Respondents, Bowman Transportation, Inc., Carolina Freight Carriers Corp., Pilot Freight Carriers, Inc., McLean Trucking Company, Mercury Motor Express, Inc., Thurston Motor Lines, Inc. and Johnson Motor Lines, Inc.

MAURICE F. BISHOP
GERALD D. COLVIN, JR.
Counsel for Intervening Respondents

Of Counsel
BISHOP, SWEENEY & COLVIN
603 Frank Nelson Building
Birmingham, Alabama 35203
(205) 251-2881

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Questions Presented	2
Statement	2
Reasons for Denying the Writ	5
I. The Petition for Certiorari Raises No Significant Statutory or Policy Considerations Warranting Review by This Court .	
(A) The Decision Below Is Responsible Judicial Review, Procedurally, and Upon the Merits, of Agency Action Based Upon Substantial Evidence and Not Shown to Be Arbitrary or Capricious	5
(B) The Decision of the Interstate Commerce Commission on the Merits, Judicial Review, and Further Administrative Actions Are Not Mutually Exclusive	7
Conclusions	8
Certificate of Service	8

Table of Cases

American Farm Lines v. Black Ball Freight, 397 U.S. 532 (1970)	5, 7
B. J. McAdams v. Interstate Commerce Commission, 551 F.2d 1112 (8th Cir., 1977)	6
Georgia-Florida-Alabama Transportation Company v. United States, 290 F.Supp. 764 (N.D. Ala. 1968)	7

Microwave Comm., Inc. v. FCC, 515 F.2d 385, 388-89 (D.C. Cir., 1974) 4

Montship Lines, Limited v. Federal Maritime Board, 295 F.2d 224 (D.C., Cir., 1961) 6

Provisioners Frozen Express, Inc. v. ICC, 536 F.2d 1303, 1305 (9th Cir., 1976) 4, 5, 6

Tallman v. Udall, 324 F.2d 411 (D.C. Cir., 1963) 6

Statutes

28 U.S.C. Sec. 2344 ..... 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., and
NORTHERN FREIGHT LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit on Behalf of Intervening Respondents, Bowman Transportation, Inc., Carolina Freight Carriers Corp., Pilot Freight Carriers, Inc., McLean Trucking Company, Mercury Motor Express, Inc., Thurston Motor Lines, Inc. and Johnson Motor Lines, Inc.

Come now BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, INC., McLEAN TRUCKING COMPANY, MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC., and JOHNSON MOTOR LINES, INC. (the intervening respondents) and submit this their brief in opposition to a petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this case by petitioner April 10, 1978.

QUESTION PRESENTED

Should This Court Review a Court of Appeals Decision Finding a Petition for Review Untimely Under 28 U.S.C.A. Section 2344 and, Additionally, Finding No Abuse of Interstate Commerce Commission Discretion in Refusing to Reopen an Administratively Final Proceeding?

STATEMENT

The intervening respondents are motor common carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission who appeared as protestants opposing applications filed by petitioners under Section 5 of the Interstate Commerce Act for approval of the transfer of control of certificates of public convenience and necessity held by petitioners. The framework of the applications as opposed by these intervening respondents was as follows. Akers of Delaware, the holding company for Akers of North Carolina, sought to acquire control of Central and its subsidiary Northern through the purchase of all outstanding stock in Central. The certificates of Akers North Carolina and Central included substantial duplication. As part of a proposal to eliminate this duplication, an application was filed with the Commission for approval of a transfer of certain duplicating certificates of Central and Northern to Transcon, another carrier. Intervening respondents opposed not only the Akers' acquisition of Central, but also the transfer of the Central and Northern certificates to Transcon.

On oral hearing held before an Administrative Law Judge of the Commission, after the introduction of some evidence, an agreement was reached for certain stipulations to be entered which would allow intervening respondents to withdraw their

opposition to the applications. Transcon agreed to accept a restriction in the Central certificates which would limit their use to transcontinental operations between points west of the Mississippi River, on the one hand, and, on the other, points authorized by the certificates east of the Mississippi River. The certificates only authorized service east of the Mississippi, however, Transcon's certificates would allow joinder to serve points west of the Mississippi. Akers Delaware agreed to accept a price reduction from Transcon based upon the diminished utility of the certificates. Akers passed this price reduction on to the stockholders of Central as a reduction in the purchase price for the stock. The contracts between the various parties were amended and stipulations were entered in the record.

The Administrative Law Judge issued a decision incorporating the stipulations stating the authority to be transferred to Transcon, the authority to be retained by Central and Northern, and approved both transfers, i.e., purchase of the Central stock by Akers Delaware and purchase of the Central and Northern rights by Transcon. No administrative appeal was taken from the initial decision of the Administrative Law Judge which became the decision of the Commission on June 11, 1976. Both transactions were consummated. Both the 30-day administrative appeal time and the 60-day judicial appeal time passed.

Petitioners then filed a letter petition with the Commission asserting for the first time that the initial decision was incorrect in setting out the authority to be retained by Central and Northern and requesting the Commission to reissue the certificates to Central which had been sold to Transcon imposing a restriction on these certificates allowing them to be used only east of the Mississippi. The Commission issued an order finding that the petitioners had offered no explanation for delay beyond the appropriate time for filing such a petition and that no good cause had been shown for granting the petition. Petitioners filed a Petition for Reconsideration with respect to this

order. That Petition was denied by the Commission. The petitioners filed a petition for a finding that an issue of general transportation importance is involved which the Commission denied. Petitioners then instituted a petition for review of the Commission's orders in the United States Court of Appeals for the Fourth Circuit. Motions to dismiss the petition were filed and carried with the case. Briefs were submitted and the Court of Appeals issued a decision dismissing the petition based upon dual reasoning. The Court of Appeals found that petitioners had failed to file a timely petition for review under 28 U.S.C. Sec. 2344 within 60 days after the entry of the June 11, 1976 order. *Provisioners Frozen Express, Inc. v. ICC*, 536 F.2d 1303, 1305 (9th Cir., 1976); *Microwave Comm., Inc. v. FCC*, 515 F.2d 385, 388-89 (D.C. Cir., 1974). Additionally, the Court found that the Commission had not abused its discretion in denying those petitions filed after the administrative finality of the Commission's order and the running of the time for appeal of that order under 28 U.S.C. Sec. 2344. Thus, based upon the jurisdictional time for filing and the merits, the Court dismissed the Petition for Review.

REASONS FOR DENYING THE WRIT

I. The Petition for Certiorari Raises No Significant Statutory or Policy Considerations Warranting Review by This Court.

(A) The decision below is responsible judicial review, procedurally, and upon the merits, of agency action based upon substantial evidence and not shown to be arbitrary or capricious.

Contrary to petitioners' assertion, the Court of Appeals' decision does not isolate from court review any activity of the Interstate Commerce Commission. The decision could never be used as precedent precluding a *diligent* party to an administrative proceeding from judicial review of administrative action. Petitioners are not in a position to speak on behalf of *diligent* parties to administrative action. Petitioners did not even seek reopening of the administrative proceeding until beyond the 60-day period for the filing of a petition for judicial review. Petitioners have consummated transactions approved by the Interstate Commerce Commission, accepting the benefits to them allowed by that action prior to asserting error in the administrative orders. Further, as found in the *Provisioners* case, *supra*, even non-diligent parties such as petitioners have a right to a finding that an administrative agency's refusal to reopen an administratively final proceeding is not an abuse of administration discretion.

Petitioners have no citations of case law which are in any way inconsistent with the decision of the Fourth Circuit. In *American Farm Lines v. Black Ball Freight*, 397 U.S. 532 (1970), Justice Douglas' opinion clearly rebuts the argument made bv petitioners that there may be an unreviewable substantive administrative action. The point made by Mr. Justice Douglas in that case is that the Commission may accept petitions for rehearing or reopening even during the pendency of allowable judicial review. Of course, the Hobbs Act, 28 U.S.C. Section 2344, was

not applicable to judicial review of Interstate Commission orders at that time. The decision cannot be read to allow judicial review of an administratively final order beyond the 60-day period when there is no reopening by the Commission of that action.

Tallman v. Udall, 324 F.2d 411 (D.C. Cir., 1963) also deals with a different statute of limitations, 30 U.S.C. Sec. 226-2. In that case, one of the three judges sitting held that a petition filed by the petitioner requesting an exercise of supervisory authority by the Secretary of Interior would extend the time for judicial review of a subordinate's action where such a petition was a long-standing practice and there was no other administrative appeal from the subordinate's decision. The other two Judges concurred with the result of the decision but would not have considered the statute of limitations issue on the merits.

In *Monship Lines, Limited v. Federal Maritime Board*, 295 F.2d 224 (D.C.Cir., 1961), the Court allowed petitions for review of administrative action stating that the time for the running of the statute of limitations began on a ruling on the merits in response to a Petition for Rehearing. The Court stated that the Petition for Rehearing was allowed by the Agency's rules, accepted though filed late and considered on the merits. Under the circumstances, the Court held that the Agency could waive its own administrative rules for filing petitions for rehearing but *could not waive* a limitation period fixed by Congress. There is clearly no waiver in the Interstate Commerce Commission's orders ruling on petitioner's post finality pleadings in the instant case.

The case of *B. J. McAdams v. Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir., 1977) is certainly not inconsistent in any way with the case of *Provisioners Frozen Express, Inc. v. Interstate Commerce Commission*, 536 F.2d 1303 (9th Cir., 1976). In fact, in *B. J. McAdams, supra*, footnote 2 to the decision takes a paragraph to distinguish the *Provisioners* case factually.

(B) The decision of the Interstate Commerce Commission on the merits, judicial review, and further administrative actions are not mutually exclusive.

As a policy matter, petitioners argue that the decision of the Court of Appeals would prematurely involve courts in matters committed to Agency discretion. The whole thrust of Mr. Justice Douglas' opinion in *American Farm Lines, supra*, is that there should be no indivisible jurisdiction which must rest with the Court or the Commission unless there is some statutory provision to this effect.

Both the Commission and the Court ruled upon the merits of petitioner's post-finality arguments. The equities in the factual situation do not lie with petitioners. Petitioners seek to withdraw from stipulations entered with full knowledge of all facts and incorporated into the Commission action. When stipulated restrictions are accepted by an administrative law judge and relied upon by withdrawal of protestants, the Courts should uphold these restrictions. See, *Georgia-Florida-Alabama Transportation Company v. United States*, 290 F.Supp. 764 (M.D. Ala., 1968). Petitioners have been less than fully honest in presenting their arguments to the Commission and the Court as pointed out at each stage of the proceeding by these intervening respondents. Petitioners are still engaged in requesting the same relief sought in its Petition for Review to the Court of Appeals from the Commission simultaneously with this Petition, inconsistent with petitioners' policy arguments.

CONCLUSION

Intervening respondents respectfully submit there is no basis for grant of the writ sought. The Petition should be denied.

Respectfully submitted,

MAURICE F. BISHOP
GERALD D. COLVIN, JR.
BISHOP, SWEENEY & COLVIN
601-09 Frank Nelson Building
Birmingham, Alabama 35203
(205) 251-2881

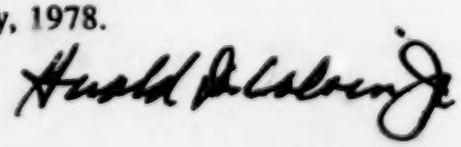
Certificate of Service

I hereby certify that pursuant to Rule 33 of the Supreme Court of the United States, I have served two copies of the foregoing Brief upon all attorneys of record by first class mail, postage prepaid, to the addresses shown by them in pleadings filed, as follows:

Leonard A. Jaskiewicz, Esq.
William H. Shawn, Esq.
Grove, Jaskiewicz, Gilliam & Cobert
1730 M Street, N.W.
Washington, D. C. 20036

Wentworth E. Griffin, Esq.
Reeder, Griffin, Dysart, Taylor & Penner
1221 Baltimore
Kansas City, Missouri 64105

This 5th day of May, 1978.



FILED
MAY 9 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., AND
NORTHERN FREIGHT LINES, INC.

vs.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

BRIEF OF INTERVENING RESPONDENT, TRANSCON LINES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WENTWORTH E. GRIFFIN
HOWARD D. LAY
ROBERT W. COTTER
1221 Baltimore Avenue
Suite 600
Kansas City, Missouri 64105
Counsel for Intervening Respondent, Transcon Lines

Of Counsel:
GRIFFIN, DYSART, TAYLOR,
PENNER & LAY, P.C.
1221 Baltimore Avenue
Suite 600
Kansas City, Missouri 64105

May 10, 1978

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 7

THE PETITIONERS HAVE HAD ADMINISTRATIVE AND JUDICIAL REVIEW ON THE MERITS 7

A. The United States Court of Appeals and the Commission have considered and denied, on the merits, the matters which petitioners claim have not been considered .. 7

B. Agency and judicial action must have a termination upon which affected parties can rely 9

I. The May 12, 1976 Order Is Not Reviewable Under the Hobbs Act 9

II. The April 28, 1977 and June 16, 1977 Orders Are Not Reviewable 13

CONCLUSION 16

Table of Authorities

CASES

B. F. Goodrich Company v. *Northwest Industries, Inc.*, 424 F.2d 1349 (3d Cir. 1970) 11

B. J. McAdams, Inc. v. *Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir. 1977) 9

Control or Consolidation of Motor Carriers, Ex Parte No. MC-79, 109 M.C.C. 448 (1970) 3

Microwave Associations, Inc. v. *F.C.C.*, 515 F.2d 385, 388-389 (D.C. Cir. 1974) 9
NLRB v. *Tennessee Products & Chem. Corp., Roane El.F. Div.*, 392 F.2d 873 (6th Cir. 1964) 15

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551, 701(a)(2) 12-16

Judiciary Code, 28 U.S.C. §§ 1, et seq.
28 U.S.C. § 2312 12
28 U.S.C. § 2341 9
28 U.S.C. § 2344 9

Interstate Commerce Act, 24 Stat. 379 (1887), 49 Stat. 543 (1935), 54 Stat. 929 (1940), 56 Stat. 284 (1942), 72 Stat. 586 (1958)
49 U.S.C. § 5(2)(a) 9
49 U.S.C. § 5(2)(b) 9
49 U.S.C. § 17(5) 10-12

Code of Federal Regulations 49 CFR
49 CFR 1100.96 11
49 CFR 1134.51(a)(2) 3

LEGAL PROCEEDINGS

Saferstein, *Nonreviewablity: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968) 13
1974 U.C. Code Congressional and Administrative News, p. 7028 12

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., AND
NORTHERN FREIGHT LINES, INC.

vs.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

BRIEF OF INTERVENING RESPONDENT, TRANSCON LINES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Transcon Lines, Intervening Respondent, in the United States Court of Appeals for the Fourth Circuit, in opposition to the Petition for a Writ of Certiorari, hereby files its Brief in Opposition to the Petition of Akers Motor Lines, Inc., of Delaware, Akers Motor Lines, Inc., of North Carolina, Central Motor Lines, Inc. and Northern Freight Lines, Inc.

QUESTION PRESENTED

Transcon Lines respectfully states that the question presented in the petition is inaccurately or incompletely stated. The United States Court of Appeals for the Fourth Circuit (Petitioners' Brief, App. 59a) reviewed the action of the Interstate Commerce Commission (the Commission) in denying the letter petition filed August 15, 1976, so the real question presented is whether the Court of Appeals has committed an error by finding "no abuse of discretion" by the Commission in denying the untimely filed letter petition or the two subsequent petitions.

STATEMENT OF THE CASE

Transcon would supplement the statement of the petitioners because it is virtually devoid of facts:

References herein are abbreviated as follows:

"Appendix" refers to Petitioners' Petition for Writ of Certiorari by page.

"JA" refers to the Joint Appendix filed in the Court of Appeals.

"R." refers to the Certified List of Documents filed by the Commission.

Akers-Delaware controlled Akers-North Carolina which sought to acquire control of Central by a purchase of the Central capital stock under MC-F-12321. Northern was a wholly owned subsidiary of Central (JA 170-171).

The parties realized that the Akers-North Carolina rights were virtually duplicative[1] of Northern and Central. Accordingly, pursuant to 49 CFR 1134.51(a)(2), and *Control or Consolidation of Motor Carriers, Ex Parte No. MC-79,* 109 M.C.C. 448 (1970), the parties notified the Commission of the duplicating rights and of their intention to eliminate the duplication by sale (JA 56, 57 and 58). See Exhibits G and H (JA 252-276), where Mr. Garland Moore for the petitioners sets out these duplications in detail.

1. Duplicating authority is where operations are possible over the same routes and highways, and between the same points.

Akers-Delaware received temporary authority from the Commission to manage Central and Northern pending approval of the sale of the Northern stock, and this temporary authority also gave Akers authority to sell duplicative rights subject to consent of the Central stockholders and Commission approval.

Pursuant to 49 CFR 1134.51(a)(2) and the power of sale, Akers-Delaware and Akers-North Carolina entered into a contract with Transcon February 13, 1975 and caused Central and Northern to contract with Transcon to sell the duplicating authority of Central and Northern (JA 105, 115).

The original contract called for less than all of the Central and the Akers-North Carolina Sub 12 authority which duplicated the other Akers and Central authority subsequent to the contract between Transcon and applicants. In a May 1, 1975 letter to the Commission (R. 48, JA 58), counsel for petitioners, in MC-F-12321, specifically recognized the problem of duplication and spelled out that the applicant, Akers-Delaware, proposed to dispose of the duplicating operating rights of Central, Northern and Akers-North Carolina, in accordance with Commission requirements citing 49 CFR 1134.51(a)(2) and as intended in the application Item 5 (JA 56-57). This letter spells out a plan, as requested by the Commission, to dispose of duplicating authority.

On June 12, 1975, Transcon, Akers-Delaware, Akers-North Carolina, Northern and Central, jointly filed for Commission approval in MC-F-12557, to acquire rights under the contract (JA 105-115). The original contract was amended August 29, 1975 (JA 147-150), and likewise, the application was amended and the parties agreed Transcon would purchase either all of the Central duplicating authority or a part of Central and Akers-North Carolina Sub 12, in the alternative, to allow the Commission to make a finding as it saw fit and as best served the public interest.

In the opening statement before the Commission, counsel for petitioners again stated to the Administrative Law Judge their intention to dispose of the duplicating operating rights (JA 172).

A number of protests were filed in MC-F-12557 to the acquisition by Transcon of the duplicating rights. The protestants feared a new aggressive competitor. At the hearing, following the direct and cross-examination of the President, shareholder and former Chairman of the Board of Central, and in response to the urging by the petitioners, Transcon proposed the following restriction which resulted in all protestants withdrawing from the hearing (JA 43):

> "The operations authorized herein are restricted to the transportation of shipments originating at or destined to points west of the Mississippi River and points west of the eastern boundary of Minnesota, except St. Louis, Missouri, East St. Louis, Illinois, and Davenport, Iowa, and their respective commercial zones, as are now or hereafter defined by the Commission."

After the protestants withdrew, the evidence proceeded upon the proposition that Transcon was buying the

same rights as before but that said rights were being accepted by Transcon with a restriction (JA 45). The purchase agreement previously executed by Transcon and Akers was amended to reduce the purchase price by $600,000 (JA 322). Likewise, Central amended its Stock Purchase Agreement reducing by $600,000 the price to be received by the shareholders. Thus, the reduction in the purchase price was not absorbed by petitioners, but was in fact absorbed by the individual shareholders. Transcon was buying the same rights, but "providing certain restrictions on *utilization* of the operating rights being purchased." (Ex. 7, ¶C) (JA 319).

The Verified Statement of Marvin F. Lourie, President of Akers-Delaware and Akers-North Carolina, Ex. 13 (JA 334) at page 9 (JA 343), states the

> "Purpose of the transaction in MC-F-12557 is to transfer the *entire* Central Motor Lines operating authority in South Carolina or to transfer the Akers Motor Lines Sub. 12 certificate to Transcon Lines." (Emphasis added)

The Commission granted permissive approval of the sale by its Order of May 12, 1976 (Appendix 1a) which became the final Order of the Commission on June 12, 1976, by operation of law. Title 49 U.S.C. 17.9(d) further provides that the Order shall become effective 30 days after service. In attempting to acquire jurisdiction, the petitioners referred to the July 20, 1976 Order [Appendix 43(a), R. 107, JA 27] which was issued by mistake as evidenced by R. 110 and R. 111.

The parties consummated the sale to Transcon on July 26, 1976 after all orders had become final, and notified the Commission of that fact. Petitioners and Transcon relied upon R. 110 and R. 111 to render the July 20, 1976

Order void although petitioners seem to be still improperly relying on this erroneous order.

During the time for administrative review, which had expired at the latest 60 days after the May 12, 1976 Order, the sellers had taken no action nor had any party filed exceptions or a petition for reconsideration with the Commission. Petitioners accepted the $2,400,000 proceeds and executed the papers to transfer the rights to Transcon in accordance with the contract documents and the intent thereof.

Petitioners' subsequent letter filings with the Commission were not treated by Transcon as sufficient to invoke jurisdiction of the Commission as the May 12, 1976 Order had become the Order of the Commission by action of law and time for exceptions and reconsideration had passed. The status of this matter is that petitioners waived and are now estopped from raising any present arguments by virtue of having consummated and accepted the money for the transfer of the restricted rights.

The Commission and the United States Court of Appeals for the Fourth Circuit have reviewed and considered the August 15, 1976 letter petition and subsequent petitions filed in light of the facts of closing and consummating the contract and the resultant waiver and estoppels raised by having accepted the money for the transfer of the restricted rights.

The action of the Commission was no abuse of discretion because the record in the case clearly demonstrated that petitioners, when they conclude the merger of the companies (i.e., the Akers, Northern and Central authorities retained after the sale to Transcon Lines), can provide transportation to the same points which they claim have been lost. The missing element in the whole transaction

is for the petitioners to carry out the balance of their commitments to the Commission for merger so the surviving entity will be able to provide complete service as originally contemplated, agreed by all the parties and represented to the Commission.

ARGUMENT

THE PETITIONERS HAVE HAD ADMINISTRATIVE AND JUDICIAL REVIEW ON THE MERITS

A. The United States Court of Appeals and the Commission have considered and denied, on the merits, the matters which petitioners claim have not been considered.

The petitioners argued before the Court of Appeals that the Commission abused its discretion and improperly denied the various out-of-time letter petitions and subsequent filings. Now, the petitioners argue that the Court of Appeals has refused judicial review when in fact the opposite is true.

The Court of Appeals, in its opinion denying petitioner's Petition for Rehearing, Appendix A, page 59a, proceeded to reach the merits and held:

> "Nor does it appear that the Commission abused its discretion in denying the letter petition filed August 15, 1976, or in denying the two subsequent petitions. The granting or denying of a petition to reopen the proceedings is within the sound discretion of the Commission and only upon a showing of a clear abuse of that discretion, could th[illegible] Court overrule its denial of the petitions."

The Court then proceeded to note that the letter petition was filed out of time, and additionally noted that the petitioners had consummated the transaction with Transcon Lines, had filed no exceptions, offered no reason for the "unexplained delay" in filing of the letter petition and the "undesirable results" that would have been created by "reopening the case." Transcon would ask this Court to recognize that in the orders of the Commission and the Court of Appeals, the merits have been continually under consideration and reviewed at each stage of these proceedings and the petitioners have created a completely false impression by their brief when they limit the question to whether or not the Court refused to review the Commission orders solely because the proceedings had become administratively final. These petitioners have had their day in Court at least a half a dozen times and the fact that they do not like the results, which have been consistently against them, does not justify this Petition for a Writ of Certiorari. Transcon Lines paid $2,400,000 in reliance upon the petitioners' acceptance of the final orders of the Commission adopting the Administrative Law Judge's Initial Decision.

The undesirable results mentioned by the Commission and the Court of Appeals, upon a reopening of this case, have to do with the fact that Transcon Lines bought and paid for certain rights from the parties following final Commission decision. The argument petitioners have tried to make about rights being cancelled or lost has absolutely no merit because the Commission clearly recognized that, under the representations made by petitioners to the Commission in the consolidated cases, they would have, by the merger of the various operating companies, retained service to all the points that are involved in this request for alleged loss of rights.

B. Agency and judicial action must have a termination upon which affected parties can rely.

I. The May 12, 1976 Order Is Not Reviewable Under the Hobbs Act.[2]

Judicial review of orders of the Interstate Commerce Commission can only be had if an appropriate petition is filed in accordance with the provisions of the Hobbs Act. As pertinent, the Hobbs Act states:

> "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The 60-day requirement of the petition to review is jurisdictional. *Microwave Associations, Inc.* v. *F.C.C.*, 515 F.2d 385, 388-389 (D.C. Cir. 1974); *B. J. McAdams, Inc.* v. *Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir. 1977). To show that the instant petition for review of the May 12, 1976 order is not timely, a somewhat detailed review of the proceedings before the Commission is necessary.

This proceeding commenced when Akers Motor Lines, Inc. filed an application seeking Commission approval of a transaction that would, among other things, result in Akers controlling Central Motor Lines, Inc. through ownership of stock. Such approval is necessary under Section 5 of the Interstate Commerce Act, with the Commission having jurisdiction to condition its approval of the transaction upon such terms and conditions as it deems just and reasonable. 49 U.S.C. §§ 5(2)(a) and 5(2)(b). The Commission's order approving the transaction, however, is merely permissive, and the parties have the right *not*

---

2. 28 U.S.C. §§ 2341, et seq.

to consummate the transaction if they object to terms and conditions imposed by the Commission.

Subsequent to the filing of the petition by Akers-Delaware, seeking control of Central and Northern, an application was filed in which Transcon sought to acquire a portion of the operating authority of Central and Northern. Both applications were assigned for oral hearing before an Administrative Law Judge of the Commission and several carriers appeared in opposition. At the hearing, the interest of protestants was settled through the imposition of a restriction on the operating authority transferred to Transcon, and protestants offered no evidence. Following the hearing, the Administrative Law Judge issued an initial decision approving the transactions subject to the requested restriction that the operating rights of Central as set forth in Appendix A of his decision be sold to Transcon Lines, and that only the rights in Appendix B to his decision be retained by Central and Northern. That order was served May 12, 1976, a copy of which is set forth in Appendix A to the Petition herein. No party filed exceptions to this initial decision and the order was not stayed by the Commission. Therefore, the May 12, 1976 order became the *final order* of the Commission by operation of law as required by Section 17(5) of the Interstate Commerce Act. 49 U.S.C. § 17(5). A notice to this effect was issued by the Commission on June 21, 1976, a copy of which is also set forth in said Appendix A, page 42a duplicated on page 43a. After receiving approval of the transaction by final order of the Commission the parties consummated the transaction on July 26, 1976, thereby accepting the lawfully imposed conditions that the operating rights in Appendix A of the report be sold

to Transcon and only those rights in Appendix B be retained by Central.[3]

At this point the entire proceeding was closed, a final order had been entered and the transaction had been consummated. Any petition seeking judicial review of a final Commission order approving a transaction under Section 5 of the Interstate Commerce Act, whether filed by those opposed to the transaction or those in favor of the transaction, clearly must be filed within 60 days of entry of the final order.[4] The Court of Appeals only has jurisdiction to review a final order of the Commission if a timely petition is filed, and since one was not filed, it could not entertain a petition seeking review of the final May 12, 1976 order. Because the Court of Appeals could not entertain a late-filed direct appeal of the May 12, 1976 order, it also could not entertain a collateral attack on that order under the guise of reviewing the subsequent April 28, 1977 and the June 16, 1977 orders. Compare *B. F. Goodrich Company* v. *Northwest Industries, Inc.*, 424 F.2d 1349 (3d Cir. 1970). This is particularly true in this case since the subsequent April 28, 1977 and the June 16, 1977 orders themselves are not reviewable because they constitute Commission action committed to Commission discretion under 5 U.S.C. § 701.

---

3. It is worth noting that the conditions imposed by the Commission resulted in an adjustment in the amount Transcon paid for the rights it purchased. The entire reduction in the purchase price, however, was charged against the consideration paid to the stockholders of Central, with no value being given to the operating rights petitioners now claim were unlawfully cancelled by the Commission.

4. The petition seeking review of the May 12, 1976 order may be dismissed on the additional ground that petitioners did not exhaust their administrative remedies through failure to file exceptions as required by 49 U.S.C. § 17(5) and the Commission's rules. 49 C.F.R. § 1100.96.

Prior to 1975, judicial review of Commission decisions was subject to the provisions of the Urgent Deficiencies Act, 28 U.S.C. § 2312, *et seq.*, and there was no time limitation during which review of Commission orders had to be sought. The problems caused by open-ended judicial review were a primary reason for placing review of Commission orders under the Hobbs Act. *1974 United States Code Congressional and Administrative News*, p. 7028. If the Court of Appeals had found that review of the May 12, 1976 order was not subject to the 60-day requirement in the Hobbs Act, thereby allowing a collateral attack on that order, the Congressional purpose in subjecting Commission orders to the Hobbs Act would have been thwarted. Here, the May 12, 1976 order became the final order by operation of law. 49 U.S.C. § 17(5). Subsequently, a party requested that the Commission modify its final order, which request was denied. If the denial of a request to modify a final order opens the door to a collateral attack on the final order, the 60-day limitation period will be meaningless. There would be absolutely no finality to an administrative order. Any party to a Commission proceeding could request the Commission to modify the terms of its final order. Upon denial, such party could then seek judicial review not only of the denial of its request but also of the issuance of the prior final order. Such a process of review would totally bypass the Hobbs Act contrary to Congressional intent. Therefore, to the extent that the petition before the Court of Appeals sought review of the May 12, 1976 order, the Court acted properly in denying it as an unlawful collateral attack on a final order not reviewable under the Hobbs Act.

II. The April 28, 1977 and June 16, 1977 Orders Are Not Reviewable.

The Court acted properly by denying review of the April 28, 1977 (Appendix A, page 48a) and June 16, 1977 (Appendix A, page 51a) orders since entry of these two orders constitutes agency action committed to agency discretion. Section 701 of the Administrative Procedure Act states that "This chapter applies except to the extent that . . . (2) agency action is committed to agency discretion by law." There is no longer any dispute that this provision limits the right of review set forth in Section 706 of the Administrative Procedure Act. However, the further issue of whether a matter is or is not committed to agency discretion presents difficult questions whose ultimate resolution is based on consideration of Congressional intent and on whether the subject matter of the agency order is appropriate for judicial review. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968). In this proceeding, an analysis of the subsequent procedures before the Commission will show that the Commission's decision not to modify its final order is clearly a matter Congress intended to be an exercise of nonreviewable agency discretion.

After the parties consummated the transaction pursuant to the final order of May 12, 1976, an officer of Central wrote a letter to Robert L. Oswald, the Secretary of the Commission, requesting that the Commission modify Appendix B to the final order to include additional operating rights. None of the parties to the proceeding before the Commission which would be adversely affected by the proposed modification thought it necessary to even reply to such a letter. Central's letter was only an informal request and the Commission was under no statutory duty

to act on it. Indeed, the Commission could have returned Central's letter, taken no action, or the Secretary of the Commission could have replied by letter. Herein, in its discretion, the Commission disposed of Central's letter by issuing an order reciting, among other things, that:

> ". . . no explanation is offered by the petitioners as to why no exceptions were filed to correct the alleged error in the initial decision, and as to why the subject petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision."

The Commission further stated that:

> ". . . in view of the unexplained delay in filing the instant petition . . . good cause has not been shown for granting the petition; . . ."

A copy of the Commission's order served November 11, 1976 is set forth in Appendix A (page 44a). In that order the Commission also informed Central that there was no merit to its claim.

Central and Northern subsequently filed petitions seeking reconsideration of the November 11, 1976 order and six motor carriers filed replies to those petitions and pointed out that the operating rights that Central sought to reinstate were the very rights the retention of which was objected to by protestants. Protestants further explained that withdrawal from the proceeding was based on an understanding that such rights would not be retained. The Commission issued an order served April 8, 1977 denying the petitions. This order is set forth in Appendix A (page 48a). Central and Northern then filed a joint petition before the Commission seeking a declaration that the proceeding involved an issue of general transportation importance. A copy of the Commission order served June

16, 1977 denying such petition is set forth in Appendix A (page 51a).

The nonreviewability of the Commission's April 28 and June 16, 1977 orders is clearly indicated by the Congressional intent and subject matter of the orders. The Congressional desire to have Commission action become final is evidenced by its passage of the Hobbs Act and Section 17(5) of the Interstate Commerce Act. Indeed, the benefits flowing from finality are obvious. It is the necessity to preserve these benefits that dictates that agency denial of requests to modify the *substance* of its final orders be placed within the sphere of unreviewable agency action. This point is amply demonstrated by testing the effect of judicial review on the discretionary Commission action exercised in entering the April 28 and June 16, 1977 orders.

First of all, petitioners could not seek judicial review if the Commission had refused to act on the letter of Central or if it had simply returned that letter. This kind of agency action has consistently been considered to be unreviewable. Compare *NLRB* v. *Tennessee Products & Chem. Corp., Roane El. F. Div.*, 329 F.2d 873 (6th Cir. 1964), where the NLRB refused to institute a complaint. The Commission's disposal of Central's letter request through the issuance of an order does not change the character of the agency's action and its nonreviewable nature is shown by the unwarranted and undesirable consequences of judicial review.

A finding that an agency's refusal to modify its final order is an abuse of discretion will ultimately and inevitably require the agency to reconsider its prior decision on the merits and issue yet another order disposing of the proceeding. That order then becomes subject to judicial review. In short, a finding that the agency abused

its discretion turns the disposition of a proceeding that was final and not reviewable on its merits under the Hobbs Act into a reviewable decision. This result so clearly conflicts with Congressional intent and is so destructive of the concept of finality that the agency discretion exercised in refusing requests to modify its order made final by law must be found to be agency action committed to agency discretion within the meaning of Section 701(a)(2) of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons intervening respondent urges that this Court enter an appropriate order dismissing the Petition for Writ of Certiorari.

Respectfully submitted,

WENTWORTH E. GRIFFIN
HOWARD D. LAY
ROBERT W. COTTER

Of Counsel:
GRIFFIN, DYSART, TAYLOR,
PENNER & LAY, P.C.
1221 Baltimore Avenue
Kansas City, Mo. 64105

May 8, 1978

Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1442

In the Supreme Court of the United States

OCTOBER TERM, 1977

AKERS MOTOR LINES, INC., OF DELAWARE, ET AL.

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

WAYNE M. SENVILLE,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE, ET AL.

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. Petitioner Akers Motor Lines filed an application with the Interstate Commerce Commission in October 1974, seeking authority under Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5, to acquire control of petitioners Central Motor Lines and Northern Freight Lines. The application was consolidated with a separate application, filed by Transcon Lines, seeking authority to purchase a portion of Central's and Northern's operating rights (Pet. App. 1a-3a).

After a hearing, an administrative law judge, on May 12, 1976, approved both applications (Pet. App. 1a-9a). An appendix to the initial decision (Pet. App. 10a-41a) enumerated all the operating rights approved for purchase by Transcon Lines and all the operating rights to be

retained by Central and Northern. Because no exceptions were filed within 30 days, the initial decision became the decision of the Commission. 49 C.F.R. 1100.96(b); 49 C.F.R. 1100.97(a) (1976 ed.).

On August 15, 1976—95 days after the initial decision was issued—Central Motor Lines filed with the Commission a letter complaining that the initial decision incorrectly listed the operating rights to be retained by Central and Northern. The Commission treated the letter as a petition for modification of the initial decision, and in November 1976 it denied the petition (Pet. App. 44a-47a). The order observed that petitioners had not explained why they had not filed no exceptions from the initial decision or why their letter-petition was not filed until more than 60 days after the effective date of the Commission's adoption of the initial decision (Pet. App. 46a). The order also stated that certain "undesirable" consequences would result if the requested modification were granted (*ibid.*).[1] In April and June 1977 the Commission denied two further petitions for administrative review (Pet. App. 48a-52a).

On June 23, 1977, petitioners filed in the court of appeals a petition seeking judicial review of the May 1976 initial decision and the Commission's orders of April and June 1977. The court of appeals dismissed the petition as untimely (Pet. App. 54a-60a). It reasoned that the 60-day time period for filing petitions for judicial review of

---

[1]Granting the petition for modification, the Commission found, would allow petitioners to "offer a service duplicative of that which Transcon Lines proposes to offer as a result of the transaction" and "would result in an unconventional division of operating authority where two carriers would provide a limited service within the same territory, tending to create confusion among shippers and wasteful and inefficient use of transportation facilities" (Pet. App. 46a).

Commission orders specified by 28 U.S.C. 2344 began to run on June 11, 1976, the date on which the initial decision became the decision of the Commission.

The running of that period was not affected, the court held, by Central's August 1976 letter, because "the letter petition * * * was untimely filed and the Commission did not find good cause for granting the petition" (Pet. App. 58a-59a). The court also held that the Commission's denial of the petition for modification and the two further petitions for administrative review "do not create new final orders which would give this court jurisdiction to review the [initial] decision which the Commission adopted" (Pet. App. 59a). Finally, the court stated that, "[b]ecause the Commission considered the 'unexplained delay' in filing the letter petition and the 'undesirable results' that would have been created by reopening the case, we find no abuse of discretion in denying the untimely filed letter petition or the two subsequent petitions" (Pet. App. 59a-60a).

2. Although we took the position in the court of appeals that the petition for review should not be dismissed, we do not believe that the issue warrants review by this Court.

Petitioners argue that the court of appeals' decision "effectively bars from review substantive agency action entered after a proceeding has become administratively final" (Pet. 5). We read the decision more narrowly. In our view, the decision is consistent with the established principle that, when an agency accepts an untimely administrative appeal or petition for rehearing and disposes of the request on the merits, both the underlying order and the order on appeal are reviewable on the merits. See *Tallman* v. *Udall*, 324 F. 2d 411, 416-417

(C.A. D.C.), reversed on other grounds, 380 U.S. 1.[2] The same rule governs untimely petitions for rehearing in the federal courts. *Pfister* v. *Northern Illinois Finance, Corp.*, 317 U.S. 144, 149-150; *Bowman* v. *Loperena*, 311 U.S. 262, 266.

But it also is settled that an untimely petition, denied because of its untimeliness, does not start anew the time within which to seek judicial review. Cf. *Califano* v. *Sanders*, 430 U.S. 99. The court of appeals apparently concluded that the Commission's disposition of the August 1976 letter-petition was more akin to a rejection on the ground of untimeliness than to an acceptance followed by a denial on the merits. Although we disagree with that assessment, we recognize that the Commission's action has elements of both a rejection and a denial on the merits. Because the case presents, in our view, only a factual issue concerning the characterization of the Commission's action in response to Central's August 1976 letter-petition, we see no reason for this Court to review the court of appeals' judgment.

---

[2]In *Tallman* the plaintiffs did not seek judicial review of a final order of the Secretary of the Interior within the statutory 90 day period. More than five months after the order, however, the plaintiffs filed a petition with the Secretary seeking the exercise of his supervisory authority to revise his initial decision. The Secretary denied this petition on the merits. The court of appeals held that the plaintiffs could obtain judicial review of the original order because their petition seeking reconsideration had been considered on the merits and the Secretary had reaffirmed his decision. See also *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 151 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

WAYNE M. SENVILLE,
Attorney,
Interstate Commerce Commission.

MAY 1978.

DOJ-1978-05